Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services	)	MB Docket No. 14-261
	)	
Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding	)	MB Docket No. 12-83
	)	
Complaint of Sky Angel U.S., LLC Against Discovery Communications, LLC, *et. al.* for Violation of the Commission's Competitive Access to Cable Programming Rules	)	MB Docket No. 12-80

COMMENTS OF SKY ANGEL U.S., LLC

Sky Angel U.S., LLC ("Sky Angel") submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") released December 19, 2014 in the above-captioned proceeding.[1] As Sky Angel previously detailed,[2] the statutory and regulatory definitions of a "multichannel video programming distributor" ("MVPD") clearly encompass a service like that provided by Sky Angel, and this type of innovative service is exactly what Congress intended to promote through the program access provision of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[3] Sky Angel therefore believes this threshold legal issue in the above-captioned program access complaint proceeding was ripe for decision nearly five years ago, before the unlawful withholding of valuable programming subjected Sky Angel,

[1] *See Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Notice of Proposed Rulemaking, 29 FCC Rcd 15995 (2014) ("NPRM").

[2] *See, e.g.*, Reply to Answer to Program Access Complaint, Sky Angel U.S., LLC, MB Docket No. 12-80 (May 6, 2010); Renewed Petition of Sky Angel U.S., LLC for Temporary Standstill, MB Docket No. 12-80 (May 27, 2011); Comments of Sky Angel U.S., LLC, MB Docket Nos. 12-80 & 12-83 (May 14, 2012) ("Sky Angel PN Comments") (*see* Attachment A hereto); Reply Comments of Sky Angel U.S., LLC, MB Docket Nos. 12-80 & 12-83 (June 13, 2012) ("Sky Angel PN Reply Comments") (*see* Attachment B hereto).

[3] *See* NPRM, 29 FCC Rcd at 16006 ("[T]he goals of the program access provision … are to increase competition and diversity in the video programming market, to increase the availability of programming to persons in rural areas, and to spur the development of communications technologies").

and thus consumers, to the harms Congress sought to prevent by imposing program access obligations upon vertically-integrated programming providers.

Nevertheless, Sky Angel appreciates that, in the NPRM, the Commission "tentatively conclude[d] that the statutory definition of MVPD includes certain Internet-based distributors of video programming."[4] Specifically, the Commission proposes "to interpret the term MVPD to mean *all* entities that make available for purchase, by subscribers or customers, multiple streams of video programming distributed at a prescheduled time."[5] Sky Angel agrees with the Commission that this approach, which is required by the plain language of the 1992 Cable Act, is necessary to ensure "that nascent, Internet-based video programming services will have access to the tools they need to compete with established providers."[6]

As the Commission notes, only its proposed Linear Programming Interpretation is consistent with the statutory language, its own precedent, and Congressional intent. For instance, use of the cable-specific definition of "channel" to restrict the type of entity that qualifies as an MVPD would exclude many of the specifically enumerated examples from the scope of the definition.[7] Accordingly, the alternative Transmission Path Interpretation would, in effect, "exclude from the coverage of the statute most of the conduct that Congress obviously intended to prohibit."[8] On the other hand, the Linear Programming Interpretation would ensure that both the benefits and obligations of MVPD status apply to services that are functionally identical to "traditional" MVPDs from the perspective of consumers,[9] for whose benefit

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[4] *Id.* at 16000.

[5] *Id.* (emphasis added).

[6] *Id.* at 15996 (internal citation omitted).

[7] *See id.* at 16005 ("DBS providers are specifically included in the definition as MVPDs, but the linear streams of video programming that they provide to subscribers do not align with the definition of 'channel' in Section 602(4) of the Act, because that definition specifically refers to the electromagnetic spectrum 'used in a cable system.'").

[8] *Holloway v. U.S.*, 526 U.S. 1, 9 (1999).

[9] *See* NPRM, 29 FCC Rcd at 16004 ("We tentatively conclude that the essential element that binds the illustrative entities listed in the provision is that each makes multiple streams of prescheduled video programming available for purchase, rather than that the entity controls the physical distribution network.").

Congress created the program access requirements.[10] Under similar circumstances, to determine whether one communication service is "like" another, both the courts and the Commission have used a "functional equivalency" test, the "linchpin" of which "is customer perception."[11]

In addition, use of the Linear Programming Interpretation is required given that the Commission has previously held that MVPD status does not hinge on whether an entity provides the physical means by which subscribers receive its programming.[12] For instance, in recognition of the fact that a television receive-only satellite program distributor, which is included in the MVPD definition, is not facilities-based, the Commission concluded that an MVPD "need not own its own basic transmission and distribution facilities."[13] Similarly, in finding that an open video system video programming provider "clearly constitutes" an MVPD, the Commission rejected the argument that programming providers cannot qualify as MVPDs because they do not operate a distribution vehicle, finding this argument "unsupported by the plain language of Section 602(13), which imposes no such requirement."[14]

The Linear Programming Interpretation also is consistent with the intent of Congress when it enacted an MVPD definition open-ended in scope[15] and "broad in its coverage."[16]

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[10] *See* 138 Cong. Rec. S712, S742, 1992 WL 15509 (Jan. 31, 1992) (statement of Sen. Metzenbaum) ("Consumers are interested in getting cable programming, Mr. President. They are less interested in the technology which is used to deliver that programming to their home.").

[11] *Inquiry Into the Existence of Discrimination in the Provision of Superstation and Network Station Programming*, Report, 5 FCC Rcd 523, 530 (1989); *see Ad Hoc Telecommunications Users Committee v. FCC*, 680 F.2d 790, 796 (D.C. Cir. 1982) ("[T]he functional equivalency test, with customer perception as a linchpin, is an appropriate standard for determining section 202(a) 'likeness.'") (internal citation omitted).

[12] NPRM, 29 FCC Rcd at 16004.

[13] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5652 (1993); *see Turner Vision, Inc. et al. v. Cable News Network, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 12610, 12635 (CSB 1998) (rejecting the claim that "program access protection is somehow dependent upon their ownership of transmission facilities").

[14] *Implementation of Section 302 of the Telecommunications Act of 1996*, Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, 20301-02 (1996).

[15] *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, 8 FCC Rcd 194, 195, n. 13 (1992) ("[T]he complete scope of this definition is unclear…"); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 2965, 2997 (1993) ("[T]he list of multichannel distributors in the definition is not meant to be exhaustive…").

Congress undoubtedly chose this open-ended definition in order to allow the Commission to fully effectuate the "broad and sweeping terms" of the program access provisions,[17] and thereby achieve their "expansive goals."[18] As such, the MVPD definition "should be given broad, sweeping application."[19] In addition, because Congress sought to generally promote competition to cable operators rather than advance particular alternative technologies, and because Congress recognized that it could not foresee the future of video distribution,[20] it was careful to enact a technology-neutral MVPD definition.[21] Congress also recognized that a technology-neutral definition would help "to spur the development of communications technologies."[22] Notably, Sky Angel previously detailed numerous instances when both Congress and the Commission clearly indicated that the MVPD definition was not intended to be limited only to those video programming distributors that existed in 1992.[23]

Given this substantial evidence that Congress intended a broad and technology-neutral MVPD definition, it cannot be reasonably argued that a single reference to spurring "facilities-based" competition indicates that Congress sought to promote this goal above the various pro-consumer, pro-competition objectives that were the true focus of the 1992 Cable Act. This

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[16] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, Notice of Proposed Rule Making, 7 FCC Rcd 8055, 8065 (1992).

[17] *NCTA v.* FCC, 567 F.3d 659, 664 (D.C. Cir. 2009).

[18] *Cablevision Systems Corp. v. FCC*, 649 F.3d 695, 706 (D.C. Cir. 2011) ("[T]he conference report emphasizes the statute's expansive goals…").

[19] *NCTA*, 567 F.3d at 664 ("[S]tatutes written in broad, sweeping language should be given broad, sweeping application").

[20] *See* 138 Cong. Rec. S712, S746, 1992 WL 15509 (Jan. 31, 1992) (statement of Sen. Chafee) ("I don't think we quite comprehend what the next decade holds for us in terms of advanced communications."); Edward J. Markey, *Cable Television Regulation: Promoting Competition in a Rapidly Changing World*, 46 Fed.Comm.L.J. 1 (1993-94) (emerging technologies are "driving our society towards a multimedia future that most of us can dimly imagine").

[21] *See* NPRM, 29 FCC Rcd at 16005-06; *Implementation of Cable Television Consumer Protection and Competition Act*, Memorandum Opinion and Order on Reconsideration of the First Report and Order, 9 FCC Rcd 1902, 1950 (1994) ("Congress did not differentiate among the technologies used by competitors in the program access provisions…"); S. Rep. No. 102-92, at 1159 ("Without fair and ready access on a consistent, technology-neutral basis, an independent entity … cannot sustain itself in the market.").

[22] 47 U.S.C. §548(a).

[23] *See* Sky Angel PN Comments at 10-13.

single reference certainly cannot be deemed controlling when the express purposes of the program access provision, as set forth in Section 628(a), make no mention of promoting facilities-based competition. In addition, neither the House nor Senate Report refer to this alleged overarching goal.[24] In fact, neither report even uses the term "facilities-based," and no report, including the Conference Report, uses the term "transmission path." Moreover, the only time Congress included "transmission path" in the Title VI definitions was in describing a "cable system," and it used the term "closed transmission path."[25] Of the specifically enumerated MVPD services, only cable operators provide closed transmission paths.[26]

Further, only the Linear Programming Interpretation is consistent with Congress' use of the term "channel" in its common, everyday sense – *i.e.*, a linear programming network.[27] As recognized by the Supreme Court, "absent sufficient indication to the contrary," there is a presumption that "Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning."[28] Here, no "sufficient indication" exists that Congress used the term "multiple channels" to mean anything but "multiple programming networks." In fact, as the Commission notes, the legislative history refers to programming networks as "channels,"[29] and Sky Angel previously quoted 23 separate instances where members of Congress, in debating the 1992 Cable Act, used this ordinary, common meaning of the term "channel."[30]

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[24] *See* H.R. Rep. 102-628 (June 29, 1992) & S. Rep. 102-92 (June 28, 1992).

[25] *See* 47 U.S.C. §522(7).

[26] *See Definition of a Cable Television System*, Report and Order, 5 FCC Rcd 7638, 7639 (1990) ("Congress expressed virtually identical views concerning the types of services – DBS, MDS, and STV – that were not considered cable systems. All of these services used radio waves … and thus stand in sharp contrast to the 'closed transmission paths' referred to in both the Senate and House versions of the Act.").

[27] *See* NPRM, 29 FCC Rcd at 16004 ("[W]e tentatively conclude that Congress … intended the term to be given its ordinary and common meaning.").

[28] *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 388 (1993); *see also Walters v. Metropolitan Ed. Enterprises, Inc.*, 519 U.S. 202, 207 (1997) ("In the absence of an indication to the contrary, words in a statute are assumed to bear their ordinary, contemporary, common meaning.").

[29] *See* NPRM, 29 FCC Rcd at 16007.

[30] *See* Sky Angel PN Comments at 25-28; *see also U.S. v. Locke*, 471 U.S. 84, 95 (1985) ("Congressmen typically vote on the language of a bill … [as] expressed by the ordinary meaning of the words used.").

The Act's pro-competition, pro-consumer goals further demonstrate that the MVPD definition should be interpreted using the common meaning of a "channel" given that the Supreme Court has held that the meaning of a statutory term "depends on the purpose with which it is used in the statute…"[31] Here, because Congress' clear intent was to promote competition, spur new communications technologies, and protect a consumer's ability to access one or more programming networks from its preferred distributor at reasonable rates, "[a]ny reasonable interpretation of the statute [] must harmonize with this goal."[32] Sky Angel also previously detailed various instances when the Commission used "channels" to refer to multiple programming networks, both prior to the 1992 Cable Act, including in an effective competition rulemaking proceeding referenced several times in the Act's legislative history, and after the Act's enactment, including in several orders implementing the Act's provisions.[33]

Finally, Sky Angel stresses that the public interest requires that the Commission use the Linear Programming Interpretation to determine whether a distributor qualifies as an MVPD. For instance, as the Commission notes, "extending program access protections to Internet-based providers would allow them to 'access[] critical programming needed to attract and retain subscribers.'"[34] Without these protections, vertically-integrated programmers will continue to have both the incentive and ability to withhold valuable programming from Internet-based

[31] *Helvering v. Hammel*, 311 U.S. 504, 507 (1941); *see also Crandon v. U.S.*, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.").

[32] *Commissioner of Internal Revenue v. Engle*, 464 U.S. 206, 218 (1984); *see* NPRM, 29 FCC Rcd at 16008 (noting that use of the common meaning of "channel" would be "most consistent with consumer expectations because consumers are focused on the content they receive, rather than the specific method used to deliver it to them").

[33] *See* Sky Angel PN Comments at 28-32.

[34] NPRM, 29 FCC Rcd at 15997 (quoting *Revision of the Commission's Program Access Rules*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 12605, 12608 (2012) ("*2012 Program Access Order*"); *see Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifteenth Report, 28 FCC Rcd 10496, 10518 (2013) ("*Fifteenth Competition Report*") ("New MVPD entrants cannot successfully compete in the video marketplace without access to programming.").

distributors,[35] which would "predictably harm competition and diversity in the distribution of video programming, to the detriment of consumers."[36]

Promoting competition, as Congress intended, is particularly important given that the high level of concentration in the MVPD market, which has continued to increase in recent years,[37] creates the "potential for competitive concerns."[38] Moreover, because the geographic footprint of a cable or telephone MVPD "rarely overlaps the geographic footprint of another" cable or telephone MVPD, these "MVPDs rarely compete with one another…"[39] As a result, only one in three Americans currently have access to more than two non-DBS MVPDs.[40] In other words, an unreasonable number of consumers are located in markets lacking the competitive pressures that otherwise would cause distributors to focus on "lowering prices, improving customer service, or generating new and diverse programming…"[41] The fact that cable prices generally rise in excess of inflation serves as a clear indicator that the current level of competition fails to adequately protect the public interest.[42]

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[35] *See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746, 766 (2010) ("*2010 Program Access Order*") (noting "substantial evidence that cable firms withhold affiliated programming from competitors when not barred from doing so").

[36] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791, 17819 (2007).

[37] *See Fifteenth Competition Report*, 28 FCC Rcd at 10506-07 (noting that the percentage of all cable subscribers served by the five largest cable operators increased from 80.1% in 2010 to 81.7% in 2012, and that the percentage of all cable subscribers served by the ten largest cable operators increased from 89.1% in 2010 to 90.4% in 2012).

[38] *Id.* at 10512.

[39] *Id.*

[40] *See id.* at 10514, Table 2 (noting that only 35.3% of Americans have access to at least four MVPDs); *id.* at 10509 (noting that the Commission "assume[s] that DBS MVPDs are available to all homes").

[41] *2010 Program Access Order*, 25 FCC Rcd at 827 (Statement of Commissioner Mignon L. Clyburn); *see Fifteenth Competition Report*, 28 FCC Rcd at 10551 ("The structural and behavioral characteristics of a competitive market are desirable … as a means of bringing tangible benefits to consumers, such as lower prices, higher quality, and greater choice of video services.").

[42] *2010 Program Access Order*, 25 FCC Rcd at 762, n. 91 ("[T]here is evidence that cable prices have risen in excess of inflation."); *see Fifteenth Competition Report*, 28 FCC Rcd at 10553, Table 5 (noting that the average monthly price for basic cable service increased by 6.2% from 2011 to 2012); CIA, *The World Factbook 2013* (2013) (available at https://www.cia.gov/library/publications/download/download-2013/) (noting that the inflation rate for the U.S. in 2012 was only 2.1%).

For these reasons, the Commission must take concrete steps to promote competition in the MVPD market. In particular, the Commission must ensure that Internet-based distributors have a reasonable opportunity, through application of the program access protections, to acquire the programming they need in order to become viable competitors.[43] As the Department of Justice has explained, because "[e]ntry into traditional video programming distribution is expensive, and new entry is unlikely in most areas," "Internet-based offerings are likely the best hope for additional video programming distribution competition."[44] Sky Angel also notes that the large market shares held by a few established MVPDs make the program access protections even more crucial to new competitors, including Internet-based distributors, given that the Commission has found that "the profitability of exclusivity increases as the number of subscribers controlled by the vertically integrated cable operator increases."[45] In addition, the Commission's finding that the emergence of new entrants "enhances the incentive of incumbent cable operators to engage in unfair acts with their affiliated programming" further demonstrates the necessity of providing program access protections to Internet-based distributors.[46]

In sum, because Congress did not define "channels" as used in the MVPD definition, because interpreting this term to mean "linear programming networks" would advance the purpose of the program access rules, and because Congress consistently used "channels" in its everyday sense, the only reasonable and non-arbitrary way to define an MVPD is simply to

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[43] *See* NPRM, 29 FCC Rcd at 16045 (Statement of Chairman Tom Wheeler) ("[E]fforts by new entrants to develop new video services have faltered because they could not get access to programming content that was owned by cable networks or broadcasters.").

[44] Dep't of Justice, *U.S. v. Comcast Corp.*, Complaint, Case 1:11-cv-00106, ¶ 9 (filed Jan. 18, 2011); *see Fifteenth Competition Report*, 28 FCC Rcd at 10530 (noting that large fixed costs "may delay the entrance of a new MVPD").

[45] *2012 Program Access Order*, 27 FCC Rcd at 12616.

[46] *2010 Program Access Order*, 25 FCC Rcd at 765; *see id.* (explaining that, because of their small subscriber bases, "withholding affiliated programming from these new entrants would not cause programmers to lose a significant current source of revenue").

require that the particular distributor "make[s] available for purchase, by subscribers or customers, multiple streams of video programming distributed at a prescheduled time."[47]

Respectfully submitted,

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[47] NPRM, 29 FCC Rcd at 16000.

Attachment A

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COMMENTS OF SKY ANGEL U.S., LLC

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TABLE OF CONTENTS

EXECUTIVE SUMMARY……..…….…ii

I. SKY ANGEL'S INNOVATIVE SERVICE…….. 2

II. BACKGROUND……..…….. 3

III. CONGRESS INTENDED FOR THE TERM "MULTICHANNEL VIDEO PROGRAMMING DISTRIBUTOR" TO BE INTERPRETED BROADLY……..…..……. 9

IV. THE EXPRESSLY NON-EXHAUSTIVE LIST OF EXAMPLES DOES NOT LIMIT THE DEFINITION OF AN MVPD……...……..……14

V. CONGRESS USED THE TERM "MULTIPLE CHANNELS" TO MEAN "MULTIPLE VIDEO PROGRAMMING NETWORKS"……..…..…….……. 20

VI. CONGRESS USED THE TERM "CHANNELS OF VIDEO PROGRAMMING" TO MEAN "LINEAR PROGRAMMING NETWORKS"……....…… 33

VII. SKY ANGEL CLEARLY "MAKES AVAILABLE" MULTIPLE CHANNELS OF VIDEO PROGRAMMING…….……..……..34

VIII. THE PUBLIC INTEREST REQUIRES THAT SKY ANGEL'S INNOVATIVE SERVICE BE CLASSIFIED AS AN MVPD ENTITLED TO THE PROTECTIONS OF THE PROGRAM ACCESS RULES……..…….……... 36

IX. CONCLUSION…….. 42

EXECUTIVE SUMMARY

Sky Angel U.S., LLC ("Sky Angel") provides an affordable, nationwide, subscription-based service of approximately eighty linear channels of exclusively family-friendly video and audio programming, including many of the nation's most popular non-broadcast networks. Sky Angel utilizes satellite uplinks and downlinks, fiber it controls, and subscribers' broadband Internet connections to aggregate and distribute multiple channels of video programming. The IP-formatted, securely encrypted programming, for which Sky Angel's content partners are compensated on a per-subscriber basis, is transmitted to proprietary set-top boxes which decrypt the programming and deliver it directly to subscribers' television sets.

Subscribers cannot access Sky Angel's programming without a set-top box, and they choose particular programming channels via a channel guide displayed on their televisions. Thus, from a consumer's perspective, Sky Angel is functionally identical to "traditional" multichannel video programming distributors ("MVPDs"). Sky Angel's innovative service, and the competition it poses to established MVPDs, is exactly what Congress envisioned when it applied program access obligations to vertically-integrated programming providers.

In October 2007, Sky Angel and Discovery Communications, LLC and its affiliate, Animal Planet, L.L.C. (collectively, "Discovery") entered into an agreement allowing Sky Angel to distribute, via an "IP System," several of Discovery's linear programming networks. Although Discovery never expressed any dissatisfaction with respect to the agreement or Sky Angel's service, in December 2009, Discovery suddenly informed Sky Angel that it intended to unilaterally terminate the agreement, and thus withhold its programming from Sky Angel's existing and potential subscribers in violation of the program access rules. On March 24, 2010, after Discovery repeatedly refused to either retract its threat or provide a justification for it, Sky

Angel filed a program access complaint (the "Complaint") with the Media Bureau. At the same time, Sky Angel filed a petition requesting that the Bureau grant a temporary standstill to prevent Discovery's withholding pending the outcome of the program access proceeding.

On April 21, 2010, before Sky Angel timely responded to Discovery's claimed defenses, including that Sky Angel fails to qualify as an MVPD, the Bureau declined to issue a standstill, finding that Sky Angel had not satisfied the heavy burden imposed upon a party seeking injunctive relief. Significantly, in doing so, the Bureau noted the limited record before and the lack of FCC precedent, and emphasized that its decision not to issue a standstill "should not be read to state or imply that the Commission, or the Bureau acting on delegated authority, will ultimately conclude … that Sky Angel does not meet the definition of an MVPD." In other words, neither the Bureau nor the full Commission has ruled on any of the merits of Sky Angel's program access complaint, including whether Sky Angel qualifies as an MVPD.

In fact, the Commission took no further action with respect to the Complaint until after a federal court of appeals required it to respond to a Petition for Writ of Mandamus in which Sky Angel asked the court to compel action on the Complaint. Six days before the Commission's deadline to file that response, the Bureau released the Public Notice seeking comment on various issues, most of which are only tangentially related, if at all, to Sky Angel's service, and thus the scope of the program access dispute proceeding for which the Public Notice allegedly addresses.

As detailed below, Congress created a broad, open-ended MVPD definition to allow the FCC to fully effectuate the program access provisions' expansive goals – namely, to prevent vertically-integrated programmers from withholding their programming from, or otherwise discriminating against, existing and emerging competitors, and thereby restrain entrenched MVPDs' anti-competitive practices. The plain and proper meaning of the MVPD definition's

terms clearly encompass a service such as Sky Angel, which is functionally identical to a cable or satellite television service, particularly in the mind of a consumer. Further, the expressly non-exhaustive list of MVPD examples enumerated in the definition do not restrict the types of distributors that qualify as an MVPD, and certainly do not require that every MVPD use particular technologies to distribute programming. In fact, Congress emphasized its desire "to spur the development of communications technologies." Moreover, Commission precedent establishes that a distributor need not be "facilities-based" or directly provide all necessary transmission paths to qualify as an MVPD. In addition, law, regulation, legislative history, and Commission precedent inarguably demonstrate that Congress used the term "multiple channels" to mean "multiple linear programming networks."

A particularized finding that Sky Angel qualifies as an MVPD also will significantly advance the public interest, as Congress intended. Increased competition leads to greater investment in new technologies, services, and programming choices, which lead to increased consumer choice at lower prices. But competing distributors, particularly new entrants, cannot effectively compete if they are denied access to vertically-integrated programming, for which there are no close substitutes. Moreover, as the Department of Justice recently concluded, competition from distributors such as Sky Angel is vitally important because the start-up costs for entry into traditional video distribution often are insurmountable, and thus the only new competitors in most areas likely will be Internet-based offerings. Increased competition from this type of MVPD also will encourage broadband adoption, a key Commission objective.

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COMMENTS OF SKY ANGEL U.S., LLC

Sky Angel U.S., LLC ("Sky Angel") hereby submits these comments in response to the Public Notice released by the Media Bureau (the "Bureau") on March 30, 2012 in the above-captioned proceeding.[1] The Public Notice arises out of a program access dispute proceeding initiated by Sky Angel against Discovery Communications, LLC and its affiliate, Animal Planet, L.L.C. (collectively, "Discovery"). As detailed below, Congress created a broad, open-ended definition of a multichannel video programming distributor ("MVPD") that clearly encompasses Sky Angel's innovative service. Accordingly, a particularized finding that Sky Angel qualifies as an MVPD entitled to the program access protections would advance Congress' pro-competition, pro-consumer goals in enacting the MVPD definition and the program access provisions as part of the Cable Television Consumer Protection and Competition Act of 1992.[2]

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[1] *Media Bureau Seeks Comment on Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding*, Public Notice, MB Docket No. 12-83, DA 12-209 (Mar. 30, 2012) ("Public Notice").

[2] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385 (1992) ("Cable Act").

I. SKY ANGEL'S INNOVATIVE SERVICE

Sky Angel provides a nationwide, subscription-based service of approximately eighty linear channels of exclusively family-friendly video and audio programming, including many of the nation's most popular non-broadcast networks,[3] at affordable rates.[4] To create this service, which in part utilizes Internet protocol ("IP") technology and proprietary set-top boxes, Sky Angel invested more than $15 million in capital expenditures. This includes an antenna site located in Tennessee consisting of eighteen satellite earth stations that receive programming from Sky Angel's content partners, who are compensated on a per-subscriber basis. After Sky Angel receives content and makes any necessary quality adjustments, it encodes, bundles and securely encrypts the programming. It then transmits the programming via fiber it controls to "headends" in New York City and Palo Alto. From there, the encrypted IP-formatted programming is sent via broadband Internet connections directly to set-top boxes in subscribers' homes.

Subscribers cannot access Sky Angel's encrypted programming without the set-top box, which decrypts the signals and transmits them to subscribers' television sets.[5] Sky Angel has the ability at all times to interact directly with the set-top box from a remote location for purposes ranging from periodic service and software updates to service activation or termination. The set-

[3] *See* www.skyangel.com/Programming/ChannelsLineUp.

[4] The monthly subscriber fee for access to all of Sky Angel's video and audio channels is only $32.99.

[5] The programming distributed via Sky Angel's service remains extremely secure until decrypted by the proprietary set-top box (*i.e.*, after the programming has traveled over a broadband Internet connection). Sky Angel uses a back-end IP distribution technology provided by NeuLion. This same technology and company is used by numerous traditional and emerging MVPDs. *See CellularVision of New York, L.P. v. SportsChannel Associates*, Memorandum Opinion and Order, 10 FCC Rcd 9273, 9279 (1995) ("[O]ur conclusions with respect to the legitimacy of defendant's concerns about CellularVision's security system are buttressed by the fact that other satellite cable programming vendors have expressed their satisfaction with CellularVision's signal security system.").

top box has broadband Internet inputs[6] and video outputs that connect directly to a television set, and the set-top box employs industry-standard copy protection. A subscriber receives the decrypted signal from the set-top box on a television set, and accesses the programming channels via a channel guide and a typical handheld remote control. Therefore, to a consumer, Sky Angel is functionally identical to traditional satellite or cable video distribution services. Sky Angel's innovative service, and the competition it poses to well-entrenched cable systems, is exactly what Congress envisioned when it applied program access obligations to vertically-integrated programmers.

II. BACKGROUND

In October 2007, Sky Angel and Discovery entered into an Affiliation Agreement for the distribution of multiple linear channels of Discovery programming in exchange for per-subscriber payments to Discovery. The agreement, the term of which extends through December 31, 2014, expressly permits use of Sky Angel's precisely-defined "IP System" to distribute Discovery's programming networks. As late as September 2009, Discovery proposed that the parties expand their agreement, asking Sky Angel to carry, and pay for, additional Discovery-owned networks.

Then, in December 2009, Discovery unexpectedly informed Sky Angel that it planned to terminate the Affiliation Agreement, and thus withhold its programming from Sky Angel's existing and potential subscribers in violation of the Commission's program access rules.[7]

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[6] Sky Angel's set-top boxes are capable of connecting to a broadband Internet connection either through a cable or a subscriber's local Wi-Fi network. The reference in Sky Angel's program access complaint to "wireless," which the Bureau references, *see* Public Notice at ¶ 4, was intended to refer only to this Wi-Fi capability. In other words, Sky Angel's set-top boxes cannot connect directly to a wireless broadband network.

[7] *See News Corp. and The DIRECTV Group, Inc., Transferors, and Liberty Media Corp., Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 23 FCC Rcd 3265, 3302 (2008) ("*DIRECTV Transfer Order*") ("[W]e will require as a condition of our approval of the transaction that the program access conditions set forth herein with respect to Liberty Media shall apply also to Discovery…"); *id.* at 3300 ("[I]n the absence of any

Although Sky Angel repeatedly sought additional information from Discovery, and offered to cooperate fully to address Discovery's alleged "concerns," Discovery refused to provide any justification, reasonable or otherwise, for its threatened termination, or even explain its "concerns" so that Sky Angel could attempt to resolve any alleged issues in a mutually satisfactory manner. Instead, Discovery simply repeated that it was "uncomfortable" with Sky Angel's distribution methodology, which had not changed since the parties executed the Affiliation Agreement two years earlier. At no time during the two years prior to Discovery's unilateral rescission had Discovery expressed any dissatisfaction with respect to the Affiliation Agreement or Sky Angel's service.[8]

On March 24, 2010, after Discovery repeatedly refused to either retract its termination threat or provide a justification for it, Sky Angel filed a program access complaint.[9] At the same time, Sky Angel filed a petition requesting that the Bureau grant a temporary standstill to prevent Discovery's withholding pending the outcome of the program access proceeding.[10] On April 12, 2010, Discovery filed an opposition to Sky Angel's Standstill Petition in which it set forth arguments regarding the merits of Sky Angel's Complaint, including that Sky Angel fails to qualify as an MVPD entitled to the protections of the program access rules.[11] Then, on April 21,

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restrictions embodied in the rules or conditions, Discovery … would be able to withhold programming or price discriminate in favor of DIRECTV.").

[8] Sky Angel had timely paid all fees owed to Discovery under the agreement at the rates required by Discovery, and Discovery accepted all such fees.

[9] *See Sky Angel U.S., LLC v. Discovery Communications LLC, et al.*, Program Access Complaint, MB Docket No. 12-80, File No. CSR-8605-P (filed Mar. 24, 2010) (the "Complaint").

[10] *See Sky Angel U.S., LLC v. Discovery Communications LLC, et al.*, Emergency Petition for Temporary Standstill, MB Docket No. 12-80, File No. CSR-8605-P (filed Mar. 24, 2010) ("Standstill Petition").

[11] *See Sky Angel U.S., LLC v. Discovery Communications LLC, et al.*, Opposition to Emergency Petition for Temporary Standstill, MB Docket No. 12-80, File No. CSR-8605-P (filed Apr. 12, 2010) ("Standstill Opposition").

2010, Discovery filed an answer to Sky Angel's Complaint, in which Discovery reiterated and expanded upon many of the arguments it made in opposing the Standstill Petition.[12]

On April 21, 2010, the same day Discovery filed its Answer and more than two weeks *before* Sky Angel timely filed its Reply on May 6, 2010,[13] the Bureau adopted an order in response to Sky Angel's Standstill Petition.[14] In other words, the Bureau issued the *Standstill Order* before Sky Angel could respond to Discovery's claimed defenses, including that Sky Angel fails to qualify as an MVPD.[15] The Bureau was forced to hastily adopt the *Standstill Order* because Discovery was threatening to, and subsequently did, turn off Sky Angel's receivers, and thus withhold its programming, on April 22, 2010.

Although the Bureau declined to grant Sky Angel's request for a temporary standstill, it expressly did not rule on the merits of Sky Angel's Complaint, including whether Sky Angel qualifies as an MVPD. Instead, the Bureau simply concluded that, "based on the record before [it] at this stage in the complaint proceeding," Sky Angel had not satisfied the heavy burden imposed upon a party moving for injunctive relief.[16] As noted, the Bureau adopted the *Standstill Order* before Sky Angel timely filed its Reply, and therefore prior to a complete record in the

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[12] *See Sky Angel U.S., LLC v. Discovery Communications LLC, et al.*, Answer to Program Access Complaint, MB Docket No. 12-80, File No. CSR-8605-P (filed Apr. 21, 2010) ("Answer").

[13] *See Sky Angel U.S., LLC v. Discovery Communications LLC, et al.*, Reply to Answer to Program Access Complaint, MB Docket No. 12-80, File No. CSR-8605-P (filed May 6, 2010) (the "Reply").

[14] *See Sky Angel U.S., LLC Emergency Petition for Temporary Standstill*, Order, 25 FCC Rcd 3879 (MB 2010) ("*Standstill Order*").

[15] Sky Angel had not detailed why it qualifies as an MVPD in its initial filings because the nature of its service makes clear that Sky Angel qualifies as an MVPD under the statutory and regulatory definitions of that term.

[16] *Standstill Order*, 25 FCC Rcd at 3881-82 (emphasis added) (citing *Amendment of Part 22 of the Commission's Rules*, Order, 8 FCC Rcd 5087, 5087 (1993) (movant must "convincingly demonstrate[]" necessity of a stay)); *see Tele-Visual Corp.*, Order, 34 FCC 2d 292, ¶ 2 (1972) ("A stay is extraordinary relief and the burden upon one who seeks such relief is a heavy one.").

proceeding.[17] The Bureau noted the limited record before it and emphasized that the *Standstill Order* had no bearing on the ultimate determination of the underlying Complaint:

> Our decision to deny Sky Angel's standstill petition should not be read to state or imply that the Commission, or the Bureau acting on delegated authority, will ultimately conclude, in resolving the underlying complaint, that Sky Angel does not meet the definition of an MVPD. Rather, based on the limited record before us at this stage and the lack of Commission precedent on that issue, we are unable to conclude that Sky Angel has met its burden of demonstrating that the extraordinary relief of a standstill order is warranted.[18]

Accordingly, neither the Bureau nor the full Commission has ruled on any of the merits of Sky Angel's program access complaint, including whether Sky Angel qualifies as an MVPD.

Because of the Commission's continued inaction on Sky Angel's Complaint for nearly two years, on February 27, 2012, Sky Angel filed a Petition for Writ of Mandamus in the United States Court of Appeals for the District of Columbia Circuit (the "Court").[19] In its Mandamus Petition, Sky Angel asked the Court to compel the Commission to adopt and release a final order on the merits of the program access complaint within thirty days of the Court's decision. On March 6, 2012, the Court ordered the Commission to file a response to the Mandamus Petition by April 5, 2012. On March 30, 2012, just six days before the Commission timely filed a response with the Court,[20] the Bureau released the Public Notice.[21] In its Mandamus Opposition, the Commission defended its unreasonable delay in acting on Sky Angel's Complaint in part on the release of the Public Notice, claiming that, "[i]n seeking comment, the Commission has made

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[17] *Standstill Order*, 25 FCC Rcd at 3883, n. 34 ("We note that the pleading cycle has not yet ended…").

[18] *Id.* at 3884 (emphasis added).

[19] *See In re Sky Angel U.S., LLC*, Petition for Writ of Mandamus, Case No. 12-1119 (filed Feb. 27, 2012) ("Mandamus Petition").

[20] *In re Sky Angel U.S., LLC*, Opposition of Federal Communications Commission to Sky Angel's Petition for Writ of Mandamus, Case No. 12-1119 (filed Apr. 5, 2012) ("Mandamus Opposition").

[21] Sky Angel notes that, prior to releasing the Public Notice, the Bureau had failed to even assign Sky Angel's program access dispute proceeding a file or docket number despite the Complaint being filed on March 24, 2010.

concrete and necessary strides toward resolution of this matter."[22] On April 19, 2012, Sky Angel filed a reply to the Commission's Mandamus Opposition.[23]

In that Mandamus Reply, among other things, Sky Angel explained to the Court that the Public Notice is unnecessary, prejudicial to Sky Angel, procedurally improper, and would further delay resolution of the program access dispute. For instance, Sky Angel noted that, although the Commission argued to the Court that seeking public comment is necessary because the dispute "presents issues of first impression that could have repercussions for a wide range of Internet-based distributors of video programming,"[24] the questions posed in the Public Notice were answered years ago – a fact Sky Angel detailed in its May 2010 Reply. For instance, as discussed in Sky Angel's Mandamus Reply and further detailed below, Congress, the FCC, and the Court have all concluded that the statutory definition of an MVPD is open-ended in its scope, broad in its coverage, and designed to encompass services that did not exist in 1992. Sky Angel also provided the Court with Commission precedent concluding that a service need not be "facilities-based" to qualify as an MVPD. In addition, Sky Angel noted that its May 2010 Reply had provided numerous examples contained in law, regulation, legislative history, and Commission precedent of the term "channel" being used in a vernacular sense.[25]

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[22] *Id.* at 15.

[23] *In re Sky Angel U.S., LLC*, Reply of Sky Angel U.S., LLC to Opposition of Federal Communications Commission to Sky Angel's Petition for Writ of Mandamus, Case No. 12-1119 (filed Apr. 19, 2012) ("Mandamus Reply").

[24] Mandamus Opposition at 15.

[25] Sky Angel also explained that, even if the dispute does present novel questions, a Public Notice issued by the Bureau, rather than the full Commission, is procedurally improper because the Bureau lacks authority to make these determinations. *See* 47 C.F.R. §0.283(c) (requiring that "[m]atters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines" be referred to the Commission en banc for disposition). Thus, if there was a need for public participation in this private adjudication, the full Commission should have sought such comment, and should have done so immediately after the Bureau first stated its belief that there is a "lack of Commission precedent" on the issue of whether Sky Angel qualifies as an MVPD. *See Standstill Order*, 25 FCC Rcd at 3884. In addition, Sky Angel noted to the Court that Commission-level action would provide a more timely opportunity for judicial review, if necessary, because a party may only seek judicial review of a full Commission decision. *See* 47 C.F.R. §1.115(k).

Sky Angel further explained that, contrary to the Commission's assertion, a particularized finding that Sky Angel qualifies as an MVPD would not have "far-reaching" implications – another fact Sky Angel had emphasized in its May 2010 Reply.[26] For instance, Sky Angel provides real-time, linear feeds of programming networks, identical to "traditional" MVPDs, while most, if not all, other distributors that provide content via hardware connected to a broadband Internet connection offer only non-linear, on-demand content. In addition, unlike the vast majority of Internet-based video distributors, Sky Angel does not distribute programming on the World Wide Web, but rather relies in part on subscribers' broadband Internet connections as one path in its distribution system. "Internet" and "World Wide Web" are discrete terms. "Internet" is a broad term that encompasses the various technology, paths, and equipment that allow the exchange of information.[27] In contrast, the "World Wide Web" is a particular form of communication that utilizes the Internet to make information publicly accessible via any connected computer terminal.[28] Accordingly, a distributor such as Sky Angel, which simply uses a broadband Internet connection as a conduit to distribute encrypted video programming to a proprietary set-top box, cannot be considered the functional equivalent of a web-based video

[26] *See Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009 (9th Cir. 1980) ("[A]n agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application."); *First Bancorp. v. Bd. of Governors of the Federal Reserve System*, 728 F.2d 434, 438 (10th Cir. 1984) (Because "the Board's order contain[ed] no adjudicative facts having any particularized relevance to the petitioner," the court "conclude[d] that the Board abused its discretion by improperly attempting to propose legislative policy by an adjudicative order.").

[27] *See* 47 U.S.C. §231(e)(3) ("The term 'Internet' means the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected worldwide network of computer networks that employ the Transmission Control Protocol/Internet Protocol or any successor protocol to transmit information."); *Reno v. ACLU*, 521 U.S. 844, 849 (1997) ("The Internet is an international network of interconnected computers."); *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4869, n. 23 (2004) ("In essence, the Internet is a global, packet-switched network of networks that are interconnected through the use of the common network protocol – IP … No single entity controls the Internet, for it is a worldwide mesh or matrix of hundreds of thousands of networks, owned and operated by hundreds of thousands of people.").

[28] *See* 47 U.S.C. §231(e)(1) ("The term 'by means of the World Wide Web' means by placement of material in a computer server-based file archive so that it is publicly accessible, over the Internet, using hypertext transfer protocol or any successor protocol."); *Reno*, 521 U.S. at 852 ("The best known category of communication over the Internet is the World Wide Web…").

programming provider, which uses a website to make programming publicly available to any computer terminal able to access the World Wide Web.

III. CONGRESS INTENDED FOR THE TERM "MULTICHANNEL VIDEO PROGRAMMING DISTRIBUTOR" TO BE INTERPRETED BROADLY

As the Bureau notes, Congress enacted an MVPD definition open-ended in scope[29] and "broad in its coverage."[30] As such, the definition "should be given broad, sweeping application."[31] Congress undoubtedly created this open-ended definition to allow the Commission to fully effectuate the "broad and sweeping terms" of the program access provisions,[32] and thereby achieve their "expansive goals."[33] Congress recognized that various non-cable competitors require access to vertically-integrated programming in order to attain these goals. In other words, Congress' intent was not to advance particular alternative technologies, but to generally provide competition to monopoly cable operators. Thus, because of this primary purpose to open the video distribution market to new competitors, it would be unreasonable to "believe that Congress intended to create a competitive video marketplace by giving one competitor a regulatory option that would be unavailable to all others."[34]

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[29] *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, 8 FCC Rcd 194, 195, n. 13 (1992) ("[T]he complete scope of this definition is unclear…").

[30] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, Notice of Proposed Rule Making, 7 FCC Rcd 8055, 8065 (1992) ("*Program Carriage NPRM*").

[31] *NCTA v.* FCC, 567 F.3d 659, 664 (D.C. Cir. 2009) ("[S]tatutes written in broad, sweeping language should be given broad, sweeping application.").

[32] *Id.*

[33] *Cablevision Systems Corp. v. FCC*, 649 F.3d 695, 706 (D.C. Cir. 2011) ("[T]he conference report emphasizes the statute's expansive goals…").

[34] *Implementation of Section 302 of the Telecommunications Act of 1996*, Second Report and Order, 11 FCC Rcd 18223, 18238 (1996) ("*Section 302 Order*"); *see id.* ("Indeed, it is because of the 1996 Act's expressed goal of promoting competition in all telecommunications markets, including the video market, that we believe Congress intended qualifying LECs and others to have the ability to offer open video services. Moreover, if one of the objectives of the open video option is to encourage new entrants, it should be available to all new entrants…").

Congress' technology-neutral policy with respect to promoting non-cable competitors[35] also included services that did not exist in 1992. "Hardly clairvoyant, especially with respect to rapidly evolving technologies,"[36] Congress recognized that it could not foresee the future of video distribution, including which technologies ultimately could constrain cable's monopolistic tendencies.[37] In fact, Section 628 expressly states that a purpose of the program access provisions is "to spur the development of communications technologies."[38] Congressional reports, legislative history, and Commission precedent further demonstrate that Congress did not intend to limit the MVPD definition only to those video programming distributors that existed twenty years ago:

- "A principal goal of H.R. 4850 is to encourage competition from alternative and new technologies…"[39]
- "[T]he Tauzin amendment includes all existing technologies – C-band satellite – as well as developing technologies. If the Tauzin language is adopted, the house will not be mandating which distribution systems will make it and which ones won't."[40]
- "There are emerging technologies that can provide competition to cable… The only thing standing in the way of fully developing these emerging technologies is access to programming."[41]

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[35] *See Implementation of Cable Television Consumer Protection and Competition Act*, Memorandum Opinion and Order on Reconsideration of the First Report and Order, 9 FCC Rcd 1902, 1950 (1994) ("*1994 Program Access Order*") ("Congress did not differentiate among the technologies used by competitors in the program access provisions…").

[36] *See Cablevision*, 649 F.3d at 706.

[37] *See* 138 Cong. Rec. S712, S746, 1992 WL 15509 (Jan. 31, 1992) (statement of Sen. Chafee) ("[T]his dramatic technological revolution is just getting started. The technologies of the near future that I have glimpsed in reports and heard about in the media seem to me to come straight out of a science fiction movie. I don't think we quite comprehend what the next decade holds for us in terms of advanced communications.").

[38] 47 U.S.C. §548(a).

[39] H.R. Rep. 102-628, 1992 WL 166238, *27 (June 29, 1992); *see id.* at *44 ("The Committee believes that steps must be taken to encourage the further development of robust competition in the video programming marketplace. Such competition may emerge from a number of sources…").

[40] 138 Cong. Rec. H6487, H6541, 1992 WL 172319 (July 23, 1992) (statement of Rep. Harris).

[41] *Id.* at H6543 (statement of Rep. Thomas).

- "[T]he access to programming provision is designed to stimulate new forms of transmitting… This section will help U.S. industry pioneer new forms of communication."[42]

- "The opportunity for new technologies to provide video service has been seriously undercut by their inability to obtain programming from cable affiliated sources."[43]

- "[M]eaningful program access promotes competition in the video marketplace so that television viewers will have the opportunity to choose among competing cable companies, wireless cable providers, C-band satellite, direct broadcast satellite, and any other new program distribution technology."[44]

- "The program access provisions were designed to ensure that competition to cable develops and to encourage competition from emerging competitors."[45]

- "As Congress recognized in enacting the program access provisions of the 1992 Cable Act, cable operators have the incentive to impede the development of other technologies into a robust competitor."[46]

The Commission has similarly anticipated future, unknown services in drafting rules to address cable's dominant market position.[47] In addition, as further proof that Congress intended for the program access rules to promote competition from all non-cable services, regardless of the technology used, Congress, the FCC, and the courts have consistently noted Section 628's expansive pro-competition, pro-consumer goals without any reference to particular types of non-cable competitors or even to the term "multichannel video programming distributor":

- "There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media."[48]

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[42] 138 Cong. Rec. S587, S591, 1992 WL 13465 (Jan. 29, 1992) (statement of Sen. Adams).

[43] 138 Cong. Rec. S712, S756, 1992 WL 15509 (Jan. 31, 1992) (statement of Sen. McCain).

[44] 138 Cong. Rec. H8671, H8676, 1992 WL 228239 (Sept. 17, 1992) (statement of Rep. Harris).

[45] *EchoStar Communications Corp. v. Fox/Liberty Networks LLC et al.*, Memorandum Opinion and Order, 13 FCC Rcd 21841, 21842 (CSB 1998).

[46] *Section 302 Order*, 11 FCC Rcd at 18322.

[47] *See, e.g., Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, Further Notice of Proposed Rulemaking, FCC 01-263, n. 92 (Sept. 21, 2001) ("*Section 11 FNPRM*") ("Although it is impossible to measure the effect of cable concentration on services that are as yet undefined, our rules should be designed to promote a fertile environment in which such services may grow and develop.").

[48] Cable Act, §2(a)(6); *see id.* at §2(b) ("It is the policy of the Congress in this Act to – (1) promote the availability to the public of a diversity of views and information through cable television and other video distribution media.").

- "[T]he conferees expect the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies."[49]

- "[T]he Committee has decided to focus on ensuring competitive dealings between programmers and cable operators and between programmers and competing video distributors."[50]

- "The Committee continues to believe that competition is essential both for ensuring diversity in programming and for protecting consumers from potential abuses by cable operators possessing market power."[51]

- "[T]his bill addresses the problem by barring programmers affiliated with cable operators from unreasonably refusing to deal with video distributors."[52]

- "Our legislative effort is designed to prevent such anticompetitive behavior by requiring that programming services not discriminate against non-cable distributors of programming."[53]

- "The Tauzin amendment, very simply put, requires the cable monopoly to stop refusing to deal, to stop refusing to sell its products to other distributors of television programs."[54]

- "The purpose of this legislation is very simple and straightforward: To promote competition in the video industry and to protect consumers from excessive rates and poor customer services where no competition exists… To promote competition, the bill ensures that competitors receive access to cable programming…"[55]

- "The program access requirements of Section 628 have at their heart the objective of releasing programming to the existing or potential competitors of traditional cable systems so that the public may benefit from the development of competitive distributors."[56]

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[49] H.R. Conf. Rep. 102-862, 1992 U.S.C.C.A.N. 1231, 1275 (Sept. 14, 1992).

[50] S. Rep. 102-92, 1992 U.S.C.C.A.N. 1133, 1160 (1991).

[51] H.R. Rep. 102-628, 1992 WL 166238, *44 (June 29, 1992)

[52] 138 Cong. Rec. S579, S582, 1991 WL 5622 (Jan. 3, 1991) (statement of Sen. Danforth).

[53] *Id.* at S590 (statement of Sen. Gore).

[54] 138 Cong. Rec. H6487, H6533, 1992 WL 172319 (July 23, 1992) (statement of Rep. Tauzin); *see id.* at H6507 (statement of Rep. Poshard) ("I was also pleased to support the Tauzin amendment to provide equal access to programming at nondiscriminatory prices by noncable technologies."); *id.* at H6536 (statement of Rep. Synar) ("Without access to programming, new program distribution services will not be able to compete against entrenched cable monopolies.").

[55] 138 Cong. Rec. S16652, S16653, 1992 WL 259585 (Oct. 5, 1992) (statement of Sen. Inouye).

[56] *Implementation of Section 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992,* First Report and Order, 8 FCC Rcd 3359, 3365 (1993).

- "[T]he concern on which Congress based the program access provisions – that in the absence of regulation, vertically integrated programmers have the ability and incentive to favor affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies such that competition and diversity in the distribution of video programming would not be preserved and protected – persists in the current marketplace."[57]

- "Through Section 628, Congress intended to encourage entry and facilitate competition in the video distribution market by existing or potential competitors to traditional cable systems…"[58]

- "The legislative history of Section 628 demonstrates Congress' deep concern with the cable industry's 'stranglehold' over programming through exclusivity and the market power abuses exercised by cable operators and their affiliated programming suppliers that deny programming to non-cable technologies."[59]

- "[P]reventing vertically integrated cable companies from engaging in unfair dealing over programming … was the primary reason Congress enacted section 628."[60]

Because Congress specifically and primarily intended to forbid practices having an anti-competitive effect on service generally, focusing only on certain types of distributors, or limiting potential competitors to those in existence in 1992, "would have been an odd way to accomplish that result."[61] Accordingly, it would be unreasonable for the Commission to interpret "MVPD" so narrowly as to exclude a competitor such as Sky Angel, whose service furthers Congress' statutory scheme.[62]

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[57] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 17 FCC Rcd 12124, 12153 (2002) ("*2002 Program Access Order*").

[58] *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746, 754 (2010) ("*Terrestrial Programming Order*"); *see id.* at 18314 ("In enacting Section 628 as part of the 1992 Cable Act, Congress sought to promote competitive entry of programming distributors competing with cable operators…").

[59] *Section 302 Order*, 11 FCC Rcd at 18321.

[60] *Cablevision*, 649 F.3d at 710.

[61] *NCTA*, 567 F.3d at 664.

[62] *See Teva Pharmaceuticals v. FDA*, 182 F.3d 1003, 1011 (D.C. Cir. 1999) ("A narrow interpretation cannot be reasonable simply because it is narrower than it *could* be; to the contrary that interpretation may in fact be narrower than it *should* be given the purposes of the statutory scheme and congressional intent.") (emphasis in original).

In fact, the Commission itself has previously indicated that Internet-based distributors of video programming qualify for the protections of the program access rules. For instance, it recently found that "a cable or telephone company's interference with the online transmission of programming by … stand-alone video programming aggregators that may function as competitive alternatives to traditional MVPDs would frustrate Congress's stated goals in enacting Sec. 628 of the Act…"[63] Similarly, in 2001, the Commission noted that, "[a]lthough cable, wireless, and satellite currently are the only technologies in use for distribution of subscription video services, other technologies may become commercially viable," including "[s]treaming video over the public Internet or over private, non-cable, fiber-optic networks…"[64]

IV. THE EXPRESSLY NON-EXHAUSTIVE LIST OF EXAMPLES DOES NOT LIMIT THE DEFINITION OF AN MVPD

The Communications Act broadly defines an MVPD as:

> [A] person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.[65]

Had Congress intended to limit the program access protections only to certain multichannel distributors, it would have enacted a specific, limiting definition. Instead, it simply provided a

[63] *Preserving the Open Internet, Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, 17975-76, ¶ 129 (2010) ("*Net Neutrality Order*").

[64] *Section 11 FNPRM*, FCC 01-263, n. 38; *see also OPP Working Paper No. 30; Internet Over Cable: Defining the Future in Terms of the Past*, 1998 WL 567433, *62 (Aug. 1998) ("Whether cable Internet-based services would constitute video programming under Title VI will depend largely upon what content is provided over the Internet and how that content is provided. For example, a basic Internet connection permitting a subscriber to visit Web sites put up by third parties may not be comparable to programming provided by a television broadcast station. In contrast, live video images transmitted across the Internet by the technique known as 'streaming' video might appear much closer to traditional broadcasting, particularly from the point of view of the subscriber.").

[65] 47 U.S.C. §522(13) (emphasis added).

non-exhaustive list[66] of several types of video programming distributors that existed twenty years ago.[67] Notably, the definition even fails to specify several types of video programming distributors now considered "traditional" MVPDs.[68]

The Bureau nevertheless suggests that every MVPD must be similar to those entities specifically enumerated in the statutory definition, and then implies that, as a consequence, an entity must be "facilities-based" and provide a "transmission path" to qualify as an MVPD. In making this suggestion, the Bureau apparently was referring to the principle of *ejusdem generis*, which states that, "where general words follow an enumeration of specific items, the general words are read as applying only to other items akin to those specifically enumerated."[69] This principle, however, "is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty."[70] Accordingly, it "does not control [] when the whole context dictates a different conclusion,"[71] and "it must not be used to defeat the obvious purpose of legislation."[72]

As detailed above, Congress' intent was to generally increase competition to monopoly cable operators and to spur the development of new communications technologies. And it

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[66] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, 2997 (1993) ("*Program Carriage Order*") ("[T]he list of multichannel distributors in the definition is not meant to be exhaustive…").

[67] *See Cablevision*, 649 F.3d at 706-07 ("We [] see no justification for construing Congress's reference to satellite programming withholding in subsection (c)(2) as an effort to prevent the Commission from addressing similar unfair practices that – two decades later – have either the purpose or effect that subsection (b) proscribes.").

[68] *See* Department of Justice, *U.S., et al. v. Comcast Corp., et al.*, Competitive Impact Statement, Case 1:11-cv-00106, p. 10 (filed Jan. 18, 2011) ("*DOJ Competitive Impact Statement*") (noting that "traditional video programming distributors" include "cable overbuilders, also known as broadband service providers," and "telcos," neither of which are enumerated in the MVPD definition).

[69] *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588 (1980).

[70] *Id.*

[71] *Norfolk & Western Railway Co. v. Amer. Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991).

[72] *Gooch v. U.S.*, 297 U.S. 124, 128 (1936); *see U.S. v. Alpers*, 338 U.S. 680, 682 (1950) ("[I]t is to be resorted to not to obscure and defeat the intent and purpose of Congress…")

intended for these goals to be achieved on a "technology-neutral basis."[73] As such, it would be wholly unreasonable to exclude every service that Congress did not expressly include in the definition, especially a service such as Sky Angel which uses a technology unknown to Congress at the time.[74] Accordingly, narrowing the MVPD definition to exclude innovative new services that fit within all of the definition's express terms, and which help to provide the precise competition Congress sought to promote, would defeat the purposes of Section 628.[75]

Moreover, even if Congress intended for all MVPDs to be similar to those specifically enumerated, this would in no way require that a service be facilities-based or directly provide all necessary transmission paths in order to qualify as an MVPD.[76] For instance, one of the listed MVPD services – a television receive-only satellite program distributor (*i.e.*, a C-Band retailer) –

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[73] S. Rep. 102-92, 1992 U.S.C.C.A.N. at 1159 ("Without fair and ready access on a consistent, technology-neutral basis, an independent entity … cannot sustain itself in the market."). This technology-neutral policy is consistent with Congress' general approach with respect to pro-consumer, pro-competition regulation. *See*, *e.g.*, S. Rep. 104-230 at 172 (Feb. 1, 1996) ("Recognizing that there can be different strategies, services and technologies for entering video markets, the conferees agree to multiple entry options to promote competition, to encourage investment in new technologies and to maximize consumer choice…"); H. Con. Res. 173, 106th Cong., at 2 (Aug. 5, 1999) ("[T]he Telecommunications Act of 1996 anticipated, and further fueled, the growth of converging digital technology and services by treating competitive service offerings on the basis of the services provided, in a technology-neutral way, and without regard to the historical regulatory antecedents of the provider of that service.").

[74] *See Cablevision*, 649 F.3d at 707 ("[W]e reject petitioners' second argument – that by leaving terrestrial programmers off the list of entities covered by section 628(b), Congress unambiguously placed terrestrially delivered programming beyond Commission jurisdiction… When Congress delegates broad authority to an agency to achieve a particular objective, agency action pursuant to that delegated authority may extend beyond the specific manifestations of the problem that prompted Congress to legislate in the first place.").

[75] *See Harrison*, 446 U.S. at 588 ("This expansive language offers no indication whatever that Congress intended the limiting construction [ ] that the respondents now urge. Accordingly, we think it inappropriate to apply the rule of *ejusdem generis*…"); *Section 302 Order*, 11 FCC Rcd at 18235-36 (finding insignificant the fact that several revisions to the Act, as well as the legislative history, referred to common carriers or telephone companies but not non-LECs because, "given the 1996 Act's overall intent to open all telecommunications markets to competition, [the Commission did] not read the legislative history's focus on telephone companies to mean that Congress intended to deny all others the opportunity to use this new model for delivering video programming.").

[76] Although the Bureau emphasizes Congress' intention to promote facilities-based competition, *see* Public Notice, ¶8, a single reference in one congressional report does not indicate that Congress sought to promote this goal above the broad pro-consumer, pro-competition goals detailed above. Moreover, this single reference cannot control when Section 628(a), which expressly sets forth the purposes of that section, makes no mention of promoting facilities-based competition. In addition, neither the House nor Senate Report, *see* H.R. Rep. 102-628 (June 29, 1992) & S. Rep. 102-92 (June 28, 1992), refer to this alleged overarching goal. In fact, neither report even uses the term "facilities-based," and none of the reports, including the Conference Report, uses the term "transmission path."

is not facilities-based.[77] As a result, the Commission has concluded that an MVPD "need not own its own basic transmission and distribution facilities."[78] Similarly, in concluding that an open video system video programming provider "clearly constitutes" an MVPD, the Commission rejected the argument that programming providers cannot qualify as MVPDs because they do not operate a distribution vehicle, finding the argument "to be unsupported by the plain language of Section 602(13), which imposes no such requirement."[79] Not only does this precedent bind the Bureau,[80] but the Commission lacks the authority to find otherwise even through a full rulemaking proceeding because the conclusion is mandated by the statutory language itself. The Commission therefore cannot now claim that a video distribution service must be facilities-based to qualify as an MVPD.[81]

Also because of Congress' inclusion of television receive-only satellite program distributors, the Commission cannot find that an entity must itself provide every transmission path used to distribute programming to subscribers because "C-Band retailers do not provide a

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[77] *See Harrison*, 446 U.S. at 588 ("The flaw in [respondents' *ejusdem generis*] argument is that at least one of the specifically enumerated provisions in §307(b)(1) … does not require the Administrator to act only after notice and opportunity for a hearing."); *see also Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fifth Annual Report, 13 FCC Rcd 24284, 24491 (1998) (Dissenting Statement of Commr. Harold Furchtgott-Roth) (noting the report "assumes that competition only exists when there is more than one (usually facilities-based) MVPD in an area…") (emphasis added).

[78] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5652 (1993) ("*Rate Regulation Order*") (emphasis added).

[79] *Implementation of Section 302 of the Telecommunications Act of 1996*, Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, 20301-02 (1996) ("*Section 302 Recon. Order*") (citing with approval a comment stating that "the fact that most open video system programming providers will use another party's network has no relevance under Section 602(13)") (emphasis added).

[80] *See AFL-CIO v. FLRA*, 777 F.2d 751, 759 (D.C. Cir. 1985) ("[A]n agency seeking to repeal or modify a legislative rule promulgated by means of notice and comment rulemaking is obligated to undertake similar procedures to accomplish such modification or repeal."); *Washington Legal Found. v. Henney*, 202 F.3d 331, 336 (D.C. Cir. 2000); *Global Crossing Telecomm'ns, Inc. v. FCC*, 259 F.3d 740, 746 (D.C. Cir. 2001).

[81] *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, n. 30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.") (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

delivery system to subscribers…"[82] More generally, the Bureau has failed to cite any statutory provision or legislative history that even implies that Congress intended for every MVPD to provide a transmission path.[83] In fact, the only time Congress included "transmission path" in the Title VI definitions was in describing a "cable system," and it used the term "closed transmission path."[84] Of the specifically enumerated MVPD services, only a cable operator provides a closed transmission path.[85] All other MVPDs, to the extent they provide any transmission paths, provide only open transmissions that can be received by any party that has the appropriate home equipment – *e.g.*, in the case of DBS, a small satellite dish and the associated set-top box.

On the other hand, like DBS, MMDS, or SMATV, Sky Angel owns or controls significant and essential transmission paths, including the originating and terminating points. Programming is delivered to Sky Angel through multiple satellite uplinks and downlinks controlled by Sky Angel. Sky Angel then encodes, bundles, and encrypts the programming, which it transmits by fiber – a closed transmission path – it controls to headends in New York City and Palo Alto, from where the programming is sent via broadband Internet connections to

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[82] *See Turner Vision, Inc. et al. v. Cable News Network, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 12610, 12635 (CSB 1998) ("CNN argues that C-Band retailers do not provide a delivery system to subscribers and that Complainants' program access protection is somehow dependent upon their ownership of transmission facilities. We reject this contention.") (emphasis added).

[83] The Bureau asks whether "MVPD" and "channel" should be interpreted to require that an entity make available a transmission path due to the "fact that many of the legal requirements applicable to MVPDs presume that the MVPD provides facilities." Public Notice, ¶ 8. But the Bureau provides no evidence to support this inaccurate statement. All of the cited rule sections either apply exclusively to cable operators and/or wireless MVPDs. *See* Public Notice, n. 9. The Bureau cannot reasonably rely on operational requirements that apply only to some MVPDs to limit the general statutory definition applicable to all MVPDs, especially because that definition expressly encompasses a non-facilities-based service.

[84] *See* 47 U.S.C. §522(7).

[85] *See Definition of a Cable Television System*, Report and Order, 5 FCC Rcd 7638, 7639 (1990) ("[B]oth bodies of Congress expressed virtually identical views concerning the types of services – DBS, MDS, and STV – that were not considered cable systems. All of these services used radio waves (without physical conduction media or devices) and thus stand in sharp contrast to the 'closed transmission paths' referred to in both the Senate and House versions of the Act.").

subscribers' homes. Certain long-recognized MVPDs likewise require subscribers to have access to and utilize an independent transmission service. For instance, without their home telephone lines, DBS subscribers can only access limited programming. Similarly, a SMATV provider distributes programming "to the residents through the *building's private cable distribution network*."[86] In contrast, Sky Angel even controls a transmission path within a subscriber's home because its encrypted programming cannot be viewed without the proprietary set-top box, which Sky Angel directly and remotely controls at all times for purposes ranging from periodic service and software updates to service activation or termination. Thus, Sky Angel does, in fact, control essential transmission paths. And Sky Angel's subscribers, through monthly payments to Internet service providers, lease the only portion of Sky Angel's distribution system it does not directly control – *i.e.*, the broadband Internet conduits connecting the headends to subscribers' homes.

In addition, Sky Angel's service clearly qualifies as an MVPD because it is identical to "traditional" MVPDs from the perspective of a consumer, for whose benefit Congress created the program access requirements. Under similar circumstances, to determine whether one communication service is "like" another, both the courts and the Commission have used a "functional equivalency" test, the "linchpin" of which "is customer perception."[87] The test's focus is "practical, oriented to customers: what function or need do customers perceive to be satisfied by the services under examination?"[88] Thus, two services that use different transmission technologies still are "like" one another if "they perform a similar communication

[86] *Rate Regulation Order*, 8 FCC Rcd at 5651 (emphasis added).

[87] *Inquiry Into the Existence of Discrimination in the Provision of Superstation and Network Station Programming*, Report, 5 FCC Rcd 523, 530 (1989); *see Ad Hoc Telecomm'ns Users Committee v. FCC*, 680 F.2d 790, 796 (D.C. Cir. 1982) ("[T]he functional equivalency test, with customer perception as a linchpin, is an appropriate standard for determining section 202(a) 'likeness.'") (internal citation omitted).

[88] *Ad Hoc Committee*, 680 F.2d at 797.

function, are perceived by the customer as similar services and their demand appears to be highly cross-elastic."[89] This test of "likeness" is consistent with Congress' treatment of all communications services, including video distribution services, and therefore is relevant in a variety on contexts.[90]

Exactly like cable or DBS, a Sky Angel subscriber inputs a wire into a set-top box which connects directly to a television set, and then accesses multiple live, linear video programming networks using an on-screen channel guide and typical handheld remote control. Clearly, cable or DBS and Sky Angel perform similar communication functions and are perceived as similar services. Subscribers are interested in receiving a diverse lineup of quality programming directly to their television sets at affordable rates, without regard to the invisible details of the intervening technology used to provide that programming.[91] Thus, even if all MVPDs must be similar to those services enumerated in the statutory definition, Sky Angel still qualifies as an MVPD entitled to the pro-consumer, pro-competition protections of the program access rules because it provides a video programming distribution service functionally identical to other MVPDs.

V. CONGRESS USED THE TERM "MULTIPLE CHANNELS" TO MEAN "MULTIPLE VIDEO PROGRAMMING NETWORKS"

Interpreting "multiple channels" to mean "multiple video programming networks" is consistent with Congressional intent and the Commission's own rules and precedent. In fact, it

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[89] *American Telephone & Telegraph Co.*, Opinion, 62 FCC 2d 774, ¶ 75b (1977).

[90] *See, e.g.*, H. Con. Res. 173, 106th Cong., 1st Session, at 3 (Aug. 5, 1999) (expressing "the intent of Congress to rely not on the historical antecedents of the providers of telecommunications services or cable services, or the facilities utilized to deliver a service, but rather on the nature of the service itself in determining its regulatory treatment."); H.R. Rep. 98-934, 1984 U.S.C.C.A.N. 4655, 4680 (Aug. 1, 1984) ("This distinction between cable services and other services offered over cable systems is based upon the nature of the service provided, not upon technological evaluation of the two-way transmission capabilities of cable systems.").

[91] *See* 138 Cong. Rec. S712, S742, 1992 WL 15509 (Jan. 31, 1992) (statement of Sen. Metzenbaum) ("The program access provisions of S. 12 set a technology-neutral policy that will help consumers and promote competition. Consumers are interested in getting cable programming, Mr. President. They are less interested in the technology which is used to deliver that programming to their home.").

is the only reasonable interpretation of the term. Congress did not provide, either explicitly or by reference, a technical definition for "channels" as that term is used in the MVPD definition. In fact, the sole Title VI definition of "channel" is expressly synonymous with "cable channel," and, by its own terms, limited to a cable system:

> [T]he term "cable channel" or "channel" means a portion of the electromagnetic frequency spectrum which is used in a cable system…[92]

The only other "channel" definitions noted in the Public Notice, or at any time in Sky Angel's program access proceeding, relate solely to over-the-air broadcast television channels.[93] Because various types of video programming distributors, each with its own unique distribution methods, are both specifically and traditionally classified as MVPDs, and because a broadcast television station is not an MVPD, no definition of channel expressly limited to a cable system or a broadcast television signal can rationally be used to limit what constitutes an MVPD.[94]

In fact, because "Congress did not differentiate among the technologies used by competitors in the program access provisions,"[95] "channels" cannot be defined by any technology-specific reference. Accordingly, interpreting "channels" in a way that narrows the MVPD definition to include only cable systems, or to apply to only certain technologies, would

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[92] 47 U.S.C. §522(4) (emphasis added). Similarly, the Commission's Part 76 definitions include only definitions of a "cable television channel," not a channel generally, and these definitions all involve "[a] signaling path provided by a cable television system..." *See* 47 C.F.R. §76.5(r)-(u) (emphasis added).

[93] *See* Public Notice, ¶ 3 and n. 31.

[94] Therefore, contrary to the Bureau's suggestion, defining "multiple channels" to mean "multiple programming networks" would not ignore a statutorily defined term because Congress only defined a "cable channel," which is always "used in a cable system." Congress did not define a channel with respect to any other MVPD. Thus, there is no statutorily defined term to ignore.

[95] *1994 Program Access Order*, 9 FCC Rcd at 1950; *see* S. Rep. 102-92, 1992 U.S.C.C.A.N. at 1161 ("To encourage competition to cable, the bill bars vertically integrated … programmers from unreasonably refusing to deal with any multichannel video distributor…") (emphasis added); 47 C.F.R. §76.1002(b)(1), n. 2 (listing potentially reasonable factors for differences in treatment so long as these factors are "applied in a technology neutral fashion.").

impermissibly restrict the intended breadth of the definition and, in effect, exclude new entrants in favor of incumbents.[96]

Use of the cable-specific definition of "channel" to restrict the type of entity that qualifies as an MVPD also would be contrary to many of the definition's specifically enumerated examples.[97] Neither DBS nor MMDS utilize "a portion of the electromagnetic frequency spectrum which is used in a cable system" because neither is, by definition, a cable system.[98] Defining "multiple channels" in this way even would remove many cable systems from the regulatory benefits and obligations that apply to MVPDs generally but not specifically to cable operators. For example, in order to address capacity problems, many cable operators have turned to Switched Digital Video, whereby "a channel is transmitted … only when the subscriber tunes to that channel."[99] In other words, from a technical perspective, many cable systems now transmit only a single "cable channel" (*i.e.*, "portion of electromagnetic frequency spectrum") to each home rather than simultaneously transmit "multiple channels" to every subscriber.[100] Thus, as a result of technological innovations, many traditional cable system MVPDs would not qualify as such under the Bureau's suggested interpretation of "MVPD."[101]

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[96] *See AFL-CIO*, 777 F.2d at 754 ("[W]hile reviewing courts should uphold reasonable and defensible agency constructions of their organic statutes, they should not 'rubber stamp … administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.'") (quoting *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 97 (1983)).

[97] *See Holloway v. U.S.*, 526 U.S. 1, 9 (1999) (rejecting petitioner's interpretation because it "would exclude from the coverage of the statute most of the conduct that Congress obviously intended to prohibit.").

[98] Nor do these MVPDs use a "signaling path as provided by a cable television system…" *See* 47 C.F.R. §76.5(r)-(u) (defining the various cable television channel classes).

[99] *Carriage of Digital Television Broadcast Signals*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 21064, 21095 (2007) (emphasis added); *see id.* ("[S]witched digital gives cable operators the means of adding channels and never running out of capacity.").

[100] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 673 (2009) ("*13th Competition Report*") ("Rather than transmitting all available channels to viewers at once…") (emphasis added).

[101] *See Section 302 Order*, 11 FCC Rcd at 18262 ("[T]here is no meaningful definition of a 'channel' in a digital world…") (emphasis added).

Rather than "indicate that Congress intended for the pre-existing definition of 'channel' to apply in interpreting the term 'MVPD,'"[102] the fact that Congress did not alter the pre-existing definition when it enacted the MVPD definition further demonstrates that the "cable channel" definition does not apply. Congress defined an "MVPD" in the same section of the Act that it defined a "cable channel," and yet it did not revise the cable channel definition even though, by its subject and express terms, that definition cannot be used to help define any video distribution service other than a cable system. Moreover, although Congress renumbered the subsection defining a "cable channel" and amended the statutory definition of a "cable service" in 1996, it again did not revise the definition of a "cable channel" or adopt any "channel" definition that could reasonably be used in determining the scope of the MVPD definition.

Accordingly, it is not only reasonable, but mandatory, for the Commission to interpret "MVPD" without reference to the earlier-adopted and never revised definition of a "cable channel,"[103] even though the two definitions are found in the same statutory section. Although there is a "presumption that a given term is used to mean the same thing through a statute," "this presumption is not absolute."[104] Rather, it "*yields readily* to indications that the same phrase used in different parts of the same statute means different things…"[105] This is because "most words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute *or even*

[102] *See* Public Notice, ¶ 7.

[103] As the Bureau noted, the 1984 Cable Act "focused exclusively on the regulation of cable television." Public Notice, ¶ 7. *See Amer. Scholastic TV Programming Found. v. FCC*, 46 F.3d 1173, 1179 (D.C. Cir. 1995) ("The singular focus on the regulation of cable systems holds throughout the Act."); *id.* at 1180, n. 5 ("The 1992 Amendments to the Act include some references to the 'multichannel video market' generally… These amendments, of course, do not elucidate the intent of the earlier Act.").

[104] *Barber v. Thomas*, 130 S.Ct. 2499, 2506 (2010).

[105] *Id.* (emphasis added).

in the same section."[106] Congress' stated purposes for enacting the program access requirements and its substantial use of "channels" in a common, non-technical, everyday manner demonstrate that the existing "cable channel" definition was not intended to be used in defining an MVPD.[107]

In fact, the Supreme Court consistently finds, "absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning."[108] This is because of "the assumption that the ordinary meaning of [statutory] language accurately expresses the legislative purpose."[109] Here, no "sufficient indication" exists that Congress used the term "multiple channels" to mean anything but "multiple video programming networks." Thus, the inquiry should end there. However, a further analysis simply reinforces this finding because the meaning of a statutory term "depends on the purpose with which it is used in the statute and the legislative history of that use."[110] As detailed above, the clear intent of the program access regime is to increase competition, encourage new communications technologies, and protect a consumer's ability to access one or more programming networks – *i.e.*, The Discovery Channel or other programming "channels" –

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[106] *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (emphasis added).

[107] *See id.* at 576 ("Context counts").

[108] *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partn.*, 507 U.S. 380, 388 (1993); *see Walters v. Metro. Ed. Enter., Inc.*, 519 U.S. 202, 207 (1997) ("In the absence of an indication to the contrary, words in a statute are assumed to bear their ordinary, contemporary, common meaning."); *Richards v. U.S.*, 369 U.S. 1, 9 (1962) ("[W]e must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used."); *Roberts v. Sea-Land Servs., Inc.*, 132 S.Ct. 1350, 1356 (2012) ("The LHWCA does not define 'awarded,' but in construing the Act, as with any statute, we look first to its language, giving the words used their ordinary meaning.").

[109] *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985).

[110] *Helvering v. Hammel*, 311 U.S. 504, 507 (1941); *see Crandon v. U.S.*, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy."); *Roberts*, 132 S.Ct. at 1357 ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

from its preferred distributor at affordable rates.[111] "Any reasonable interpretation of the statute, therefore, must harmonize with this goal."[112]

In addition, the legislative history leaves no doubt that Congress used "multiple channels" to mean "multiple video programming networks."[113] The consistent use of the term in this way by members of both chambers, including the authors and sponsors of the bills that became the Cable Act, is significant "because legislators who heard or read those statements presumably voted with that understanding."[114] Such use also comports with Congress' use of other potentially technical terms in an everyday sense.[115] The following are some of the instances in which Congress clearly used "channels" to mean "video programming networks":

- "It is difficult to believe a cable system would not carry the sports channel, ESPN, or the news channel, CNN."[116]
- "[T]he number of cable channels has not dwindled and faded under regulation. On the contrary, it has grown … from 79 channels to 128 channels in 1994."[117]
- "Many cable companies across the country are moving popular program channels such as ESPN and Turner Network Television off the basic tier in order to insulate them from any future regulatory scheme that might be imposed by the FCC."[118]

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[111] *See Environmental Defense*, 549 U.S. at 574 ("A given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies."); *Jarecki G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) ("[A] word is known by the company it keeps.").

[112] *IRS v. Engle*, 464 U.S. 206 (1984); *see Holloway*, 526 U.S. at 9 ("Because that purpose is better served by construing the statute to…, the entire statute is consistent with a normal interpretation of the specific language that Congress chose.").

[113] *See Ass'n of Civilian Technicians v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) ("This common-sense reading of the Act is amply borne out by its legislative history.").

[114] *D.C. v. Heller*, 554 U.S. 570, 605 (2008); *see U.S. v. Locke*, 471 U.S. 84, 95 (1985) ("Congressmen typically vote on the language of a bill … [as] expressed by the ordinary meaning of the words used.").

[115] *See Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Report and Order, 14 FCC Rcd 5298, 5356 (1999) ("'Transmission technology' is not a defined term in the Communications Act nor does the legislative history help to define its breadth. Rather, Congress appears to have used the phrase in the everyday sense in which it has been used in discussions of communications policy issues.") (emphasis added).

[116] S. Rep. 102-92, 1992 U.S.C.C.A.N. at 1157.

[117] H.R. Rep. 104-204, p. 228 (Jul. 24, 1995).

[118] 137 Cong. Rec. S2006, S2012, 1991 WL 19499 (Feb. 20, 1991) (statement of Sen. Metzenbaum); *see id.* ("[P]opular program channels … like CNN, ESPN, and Turner Network Television… Premium movie channels such as HBO and Showtime…").

- "Cable companies are allowed to own cable systems and the channels that provide programming for the cable systems…"[119]

- "To avoid the possibility of rate regulation, cable companies are moving popular cable channels, like CNN and TBS, from their lowest-priced tier to more expensive expanded basic tiers."[120]

- "NBC, one of the three principal television networks, decided that it wanted to develop a cable news channel to compete with CNN."[121]

- "[P]remium movie channels – for example HBO and Cinemax…"[122]

- "A key part of the cable industry's strategy is to control the popular cable program channels which are carried on systems around the country."[123]

- "[M]any operators are shifting popular cable channels – such as ESPN, TNT, and USA – off the basic tier in order to prevent such networks from being regulated."[124]

- "TCI launched a new movie channel called Encore."[125]

- "Look at these specific examples, covering almost all the major programming channels, those which make up what most of us think of as cable. Here is AMC/Bravo… Here is ESPN…"[126]

- "We were told one of the cable operators dropped 'The Learning Channel' so the value of the channel would decline."[127]

- "The fatal defect of this amendment is that it shields from regulation the very program channels which impel people to buy cable in the first place… Program

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[119] 138 Cong. Rec. S400, S408, 1992 WL 11815 (Jan. 27, 1992) (statement of Sen. Ford).

[120] *Id.* at S413 (statement of Sen. Danforth). Sen. Danforth sponsored Senate bill S.12, the "Cable Television Consumer Protection and Competition Act of 1992." *See FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) ("As a statement of one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute.").

[121] 138 Cong. Rec. S400, S426, 1992 WL 11815 (Jan. 27, 1992) (statement of Sen. Gore, a co-sponsor of S.12).

[122] 138 Cong. Rec. S587, S589, 1992 WL 13465 (Jan. 29, 1992) (statement of Sen. Helms); *see id.* ("HBO and other movie channels."); *id.* ("[C]hannels like the Disney Channel.").

[123] 138 Cong. Rec. S561, S565 (Jan. 29, 1992) (statement of Sen. Metzenbaum, a co-sponsor of S.12); *see id.* ("The big cable companies frequently have refused to sell program channels they control to these potential competitors…").

[124] *Id.* at S566 (statement of Sen. Metzenbaum).

[125] *Id.* at S561 (statement of Sen. Gorton, a co-sponsor of S.12).

[126] 138 Cong. Rec. S712, S737, 1992 WL 15509 (Jan. 31, 1992) (statement of Sen. Gore).

[127] *Id.* at S740 (statement of Sen. Wirth); *see id.* ("[A] premium channel such as Showtime, HBO or the Disney Channel…").

channels like ESPN, CNN, MTV, TNT, and USA were staples of basic cable. People would subscribe to basic cable because they could not get these channels through conventional over-the-air TV reception."[128]

- "[B]asic cable program channels such as MTV and CNN…"[129]

- "Alternative multichannel technologies like wireless cable and the satellite dish industry are poised to compete with cable. But they cannot be effective competitors unless they can deliver popular program channels to their customers. Unfortunately, the cable industry has refused to make their program channels available to potential competitors on fair terms and at nondiscriminatory prices."[130]

- "[T]he number of cable channels has increased dramatically. The proceedings of the House are now available across America via C-SPAN. Millions were able to watch the gulf war live on CNN. Local news channels are proliferating. It appears that there is, or will soon be, a channel for every state."[131]

- "We have television channels devoted exclusively to sports, weather, health, rock music, around-the-clock news."[132]

- "HBO and other premium channels…"[133]

- "What I am thinking of, in particular, are certain premium movie channels. HBO and Cinemax come most readily to mind."[134]

- "[P]opular advertiser-supported channels like CNN and ESPN, and premium cable channels like HBO."[135]

- "In many areas throughout the country, cable customers have access not just to dozens but to scores of cable channels. C-SPAN and CNN have literally changed the way Americans receive information about politics, government, and local, national, and international events."[136]

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[128] *Id.* at S741 (statement of Sen. Metzenbaum).

[129] *Id.* at S742 (statement of Sen. Metzenbaum).

[130] *Id.* (statement of Sen. Metzenbaum).

[131] 138 Cong. Rec. H6487, H6500, 1992 WL 172319 (July 23, 1992) (statement of Rep. Dingell).

[132] *Id.* at H6504 (statement of Rep. Price).

[133] *Id.* at H6525 (statement of Rep. Cooper).

[134] *Id.* at H6530 (statement of Rep. Broomfield).

[135] 138 Cong. Rec. H6546, H6558, 1992 WL 172324 (July 23, 1992) (statement of Rep. Markey). Rep. Markey sponsored House bill H.R.4850, the "Cable Television Consumer Protection and Competition Act of 1992."

[136] 138 Cong. Rec. H8671, H8673, 1992 WL 228239 (Sept. 17, 1992) (statement of Rep. Rinaldo).

- "They enjoy CNN, ESPN, MTV, and dozens of other channels."[137]

As these quotes demonstrate without a doubt, the legislative history of the Cable Act "belies any suggestion that Congress, despite its use of broad language in the [MVPD definition] itself, intended to" define channels in a technical sense, particularly in a way expressly limited only to cable systems.[138]

Similarly, the Commission itself has interpreted the MVPD definition according to the plain meaning of its terms,[139] and has consistently used the term "channels" to refer to multiple programming networks. The Commission's use of "channel" in this non-technical sense began prior to the Cable Act, which likely influenced Congress' use of the term. For example:

- "Cable operators are including more program choices on the lowest level basic tiers, including a larger number of non-broadcast program channels (*e.g.*, the Discovery Channel, MTV, CNN, USA, ESPN, etc.)."[140]
- "ESPN is a national sports channel…"[141]
- "Nick at Nite, a cable channel…"[142]
- "[I]n order to prosper, [satellite operator] SkyPix will have to gain access to additional programming, such as popular basic cable channels."[143]

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[137] 138 Cong. Rec. S14600, S14613, 1992 WL 234151 (Sept. 22, 1992) (statement of Sen. Chafee).

[138] *Algonquin*, 426 U.S. at 570; *see Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

[139] *See Rate Regulation Order*, 8 FCC Rcd at 5648 ("We construe this term according to the plain meaning of the statute as applying to entities that distribute, *i.e.*, make available to customers or subscribers, more than one channel of video programming…") (emphasis added).

[140] *Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, Notice of Proposed Rulemaking, 5 FCC Rcd 259, 261 (1990).

[141] *Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, Further Notice of Proposed Rulemaking, 6 FCC Rcd 208, 222, n. 27 (1990) ("*Effective Competition FNPRM*"); *see also ACLU v. FCC*, 823 F.2d 1554, 1559, n. 3 (D.C. Cir. 1987) ("Nonbasic cable services typically include the 'premium' movie and sports channels such as HBO and Sportschannel.").

[142] *OPP Working Paper No. 26: Broadcast Television in a Multichannel Marketplace*, 6 FCC Rcd 3996, 4056, n. 102 (1991).

[143] *Id.* at 4061; *see id.* at 4068 ("Aggregating enough channels for a commercially viable service, however, is often difficult."); *id.* at 4076-77 ("In 1990, four basic cable channels had prime-time ratings of 1.0 or better.").

- "Among the most popular basic cable channels are WTBS, USA, ESPN, and TNT."[144]

Further, in orders and reports required by the Cable Act, the Commission continued to use "channel" to mean a "video programming network":

- "Congress appeared to contemplate carriage of broadcast-affiliated cable channels as part of legitimate retransmission consent negotiations."[145]

- "Cable programmers strive to build an identity for their channel that is recognizable and sought-after by viewers. For example, when an MVPD loses access to a popular national news channel, there is little competitive solace that there is a music channel or children's programming channel to replace it. Even when there is another news channel available, an MVPD may not be made whole because viewers desire the programming and personalities packaged by the unavailable news channels."[146]

- "There are nearly 30 premium channels available, including National Geographic Channel, Disney Channel, Animal Planet, Discovery Channel, Cartoon Network, CNN, and HBO."[147]

The Commission has similarly used "channel" in this way in various other orders,[148] and has recently defined a "linear channel" as "[v]ideo content that is delivered in a scheduled mode,

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[144] *Id.* at 4089, n. 183.

[145] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791, 17865 (2007) ("*2007 Program Access Order*").

[146] *2002 Program Access Order*, 17 FCC Rcd at 12139.

[147] *13th Competition Report*, 24 FCC Rcd at 678; *see also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Second Annual Report, 10 FCC Rcd 2060, 2150 (1995) ("*Second Competition Report*") ("MMDS would be used to provide one-way broadcasts of multiple cable channels…"); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, 19 FCC Rcd 1606, 1700 (2004) ("Of the 84 regional cable channels identified this year, 27, or 33%, are sports channels.").

[148] *See, e.g.*, *Implementation of the Satellite Home Viewer Improvement Act of 1999*, First Report and Order, 15 FCC Rcd 5445, 5463 (2000) ("For example, a broadcaster might initially propose that, in exchange for carriage of its signal, an MVPD carry a cable channel owned by, or affiliated with, the broadcaster."); *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc., For Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4286 (2011) ("*Comcast Order*") ("CNBC, the number one business news channel, and MSNBC, the second-rated cable news channel."); *id.* ("Five of NBCU's cable channels generate over $200 million in annual operating cash flow."); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp., et al. to Time Warner Cable Inc., et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8367 (2006) (Dissenting Statement of Commr. Michael J. Copps) ("Both Comcast and Time Warner have ownership stakes in popular cable channels."); *id.* ("If an aspiring cable channel cannot win carriage on these big concentrated networks, its fate is sealed. It's doomed. And the record is full of examples of channels that will never get to your television.").

such as through broadcast or cable network channels."[149] In addition, Section 79.1 of the Commission's rules – which expressly applies the same definition of MVPD as the program access rules – uses the term "channel" in a non-technical sense in creating exemptions for video programming providers, who are not distributors at all and clearly do not offer any sort of transmission path:

- "No video programming provider shall be required to expend any money to caption any video programming if such expenditure would exceed 2% of the gross revenues received from that channel…"[150]

- "No video programming provider shall be required to expend any money to caption any channel of video programming producing annual gross revenues of less than $3,000,000 during the previous calendar year…"[151]

Congress' use of "multichannel" and "channels" in a common, everyday sense is further demonstrated by the Commission's effective competition rulemaking, which various lawmakers referenced during the Cable Act debates.[152] The Commission initiated that proceeding because the then-current standard, which centered on the availability of three broadcast signals in a market, "no longer provide[d] a correct measure of effective competition to the full range of cable service."[153] The Commission noted that "consumers subscribe to basic cable service for the large number and wide variety of programming services it delivers directly to the home," that

[149] *Second Competition Report*, 10 FCC Rcd at 2150.

[150] 47 C.F.R. §79.1(d)(11).

[151] 47 C.F.R. §79.1(d)(12); *see* 47 C.F.R. §79.1(f)(1) ("A video programming provider, video programming producer or video programming owner may petition the Commission for a full or partial exemption from the closed captioning requirements. Exemptions may be granted, in whole or in part, for a channel of video programming…") (emphasis added); *see also Closed Captioning and Video Description of Video Programming*, Report and Order, 12 FCC Rcd 3272, 3278 (1997) ("[C]ompliance is measured on a channel-by-channel basis, and thus the captioned programs will reflect the overall diversity of the many channels of programming now available…"); *id.* at 3309 ("[B]y measuring compliance on a channel-by-channel basis, a network will be able to set budgets and hire staff based on the requirements applicable for its own programming, without having to factor in the efforts of others.").

[152] *See, e.g.*, 137 Cong. Rec. S18336, S18377 (Nov. 26, 1991) (statement of Sen. Leahy); 138 Cong. Rec. S400, S413 (Jan. 27, 1992) (statement of Sen. Danforth); 138 Cong. Rec. S712, S746 (Jan. 31, 1992) (statement of Sen. Chafee).

[153] *Effective Competition FNPRM*, 6 FCC Rcd at 209.

"the most widely subscribed-to tier of service on average ha[d] expanded to include significant amounts of programming beyond the retransmission of local broadcast signals," and that "audience statistics indicate[d] that nonbroadcast cable programming ha[d] attracted an increasing share of the audience in cable homes."[154] The Commission further noted that "cable offers general interest channels, such as USA Network and Turner Network Television (TNT)," and a "wide array of specialized cable services like CNN, ESPN, MTV, Nickelodeon, BET and C-SPAN" that are "not available over-the-air."[155]

Because cable offered such a wide variety of programming options, the Commission concluded that "a small number of broadcast signals alone generally cannot deliver comparable service."[156] The Commission therefore revised the effective competition standard to require "at least six unduplicated over-the-air broadcast signals,"[157] "the presence of another multichannel provider that offers multiple channel options,"[158] or a showing of effective competition under the "competitive behavior test."[159] Stated differently, the Commission amended the standard because three broadcast signals no longer presented effective competition to cable's wide array of various video programming networks. Rather, because of the altered nature of basic cable service, cable operators could only face effective competition from a larger variety of programming networks, such as six broadcast stations or another service that provides numerous

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[154] *Id.*

[155] *Id.*

[156] *Id.*; *see id.* ("In sum, it is clear that the three signal standard no longer reflects effective competition to the full range of cable television service").

[157] *Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, Report and Order and Second Further Notice of Proposed Rulemaking, 6 FCC Rcd 4545, 4547 (1991) ("*Effective Competition Order*"); *see Implementation of the Provisions of the Cable Communications Policy Act of 1984*, Report and Order, 50 FR 18637, 18649 (1985) ("The number of over-the-air broadcast signals required to provide effective competition to basic cable service must be sufficient to allow viewers adequate and significant programming choices.").

[158] *Effective Competition Order*, 6 FCC Rcd at 4551.

[159] *Id.* at 4554.

programming options.[160] In other words, the Commission concluded that, regardless of the type of service or technology used, the availability of multiple video programming networks was necessary to provide effective competition to entrenched cable systems.[161]

Congress came to this same conclusion in enacting the program access rules. And, because it expressly referenced the Commission's order revising the effective competition standard in doing so,[162] Congress similarly sought to promote the availability of other services that offer multiple video programming networks in recognition of the fact that this type of service, regardless of the technology used, is necessary to provide true competition to cable, and thereby constrain the anti-competitive cable practices Congress sought to address.

In sum, because Congress did not define "channels" as used in the MVPD definition, because interpreting "multiple channels" to mean "multiple video programming networks" would advance the purpose of the program access rules, and because Congress consistently used the term in this common, everyday sense, the only reasonable and non-arbitrary way to define an MVPD is simply to require that the particular distributor "makes available for purchase, by subscribers or customers, multiple video programming networks."

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[160] *See Effective Competition FNPRM*, 6 FCC Rcd at 210 (noting that some commenters "support[ed] a revised effective competition standard based on the availability of an independently owned and operated competing multichannel video programming service that offers consumers comparable programming at a price comparable to that of the incumbent cable company," and that other commenters "recommend[ed] that the competing system be required to provide a minimum number of channels and the same broad categories of programming service as the existing cable system at a comparable price."); *Effective Competition Order*, 6 FCC Rcd at 4551, n. 42 ("DOJ encourages some measurement of the actual substitutability of channel packages since local programs, news, and network entertainment are offered only over local broadcast stations, which are not carried on some noncable multichannel systems.").

[161] *See Effective Competition Order*, 6 FCC Rcd at 4553 ("[T]he proposed array of competing services may offer channel packages that differ from those of the incumbent cable system, yet we believe that these alternatives should be considered substitutes for basic cable service since they provide a variety of programming services with many of the characteristics of local stations, such as news, sports, movies, entertainment series and so forth.").

[162] *See Dolan v. USPS*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.").

VI. CONGRESS USED THE TERM "CHANNELS OF VIDEO PROGRAMMING" TO MEAN "LINEAR PROGRAMMING NETWORKS"

As detailed above, Congress used the term "channels of video programming" to mean pre-scheduled, real-time, linear streams of video programming – *i.e.*, linear programming networks. Congress' repeated references to specific cable networks that offer this type of programming leave no room for alternative interpretations,[163] and these programming networks are exactly what the Commission concluded in 1990 and Congress concluded in 1992 are necessary to provide effective competition to monopoly cable operators. Properly defining "channels of video programming" in this way also will significantly limit the number of entities that currently qualify as MVPDs, and thus significantly limit the potential implications that extend beyond Sky Angel's program access proceeding.[164]

Sky Angel notes that the Commission's previous finding that video-on-demand "images" constitute "video programming" has no bearing on whether an entity that offers subscription programming only on an on-demand basis qualifies as an MVPD. "Video programming" is only one part of the MVPD definition. Specifically, to qualify as an MVPD, a service must provide "multiple channels of video programming," which Congress intended to mean multiple pre-scheduled, real-time, linear programming networks. Video-on-demand services, by definition, do not offer this type of service.

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[163] *See also Implementation of the Provisions of the Cable Communications Policy Act of 1984*, Report and Order, 50 FR 18637, 18640, 1985 WL 132696 (1985) ("[W]ith respect to the definition of video programming, we conclude that this definition is sufficiently expansive to include such video programming as that provided by ESPN, HBO, and other satellite-delivered cable network programming.").

[164] Sky Angel expresses no opinion as to whether the Commission should ultimately rely on its ancillary authority to interpret "channels of video programming" more broadly than the term was used by Congress in 1992. As noted, the Public Notice poses questions well beyond the scope of Sky Angel's service, and thus well beyond the scope of the program access dispute the Public Notice allegedly was designed to address. Sky Angel therefore has limited its comments to those issues actually relevant to the Bureau's resolution of its Complaint.

With respect to the necessary level of picture quality, as the Bureau notes, the Commission has concluded that streaming video qualifies as "video programming" because technological developments have allowed streaming video to be comparable in quality to programming provided by a broadcast television station.[165] Similarly, the Commission and the Department of Justice recently defined "video programming" as:

> [P]rogramming provided by, or generally considered comparable to programming provided by, a television broadcast station or cable network, regardless of the medium or method used for distribution…[166]

This precedent directly refutes Discovery's claim that the Commission has consistently held that video delivered via the Internet fails to qualify as "video programming," as well as its claim that any programming that is "streamed" cannot fit within the definition of "video programming." However, even without this precedent, "video programming," as used in the MVPD definition, could not be defined as excluding streaming video because, under that interpretation, even many cable operators would no longer be classified as MVPDs. As noted, in order to address capacity problems, cable systems are increasingly turning to Switched Digital Video, which "combines the bandwidth efficiency of compressed digital content with switching technology to enable content *to be streamed* to viewers only upon request."[167]

VII. SKY ANGEL CLEARLY "MAKES AVAILABLE" MULTIPLE CHANNELS OF VIDEO PROGRAMMING

No basis exists to find that a video programming distributor using in part broadband Internet connections must have any type of common ownership, affiliation, or other business arrangement with Internet service providers in order to "make available" multiple channels of

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[165] *See* Public Notice, n. 47.

[166] *Comcast Order*, 25 FCC Rcd at 4358 (emphasis added); Department of Justice, *U.S. v. Comcast Corp., et al.*, [Proposed] Final Judgment, Case 1:11-cv-00106, p. 7 (Jan. 18, 2011) (emphasis added).

[167] *13th Annual Report*, 24 FCC Rcd at 673-74 (emphasis added); *see id.* at 674 ("The availability of open, IP-based architecture has catalyzed the development of reliable, cost-effective, and scalable solutions to this inefficiency.").

video programming. As detailed above, and noted by the Bureau, "an entity need not own or operate the facilities that it uses to distribute video programming to subscribers in order to qualify as an MVPD."[168] Moreover, such a requirement would be contrary to Congress' pro-competition goals because it would, in effect, exclude new entrants in favor of incumbents. In fact, it would disproportionately favor cable operators – the focus of the program access rules – because 58% of Internet-connected homes receive their service through cable systems.[169] The logistics of such a requirement also would prohibit the entry of new competitors. Regardless, because Sky Angel's customers subscribe to broadband Internet services, a contractual arrangement already exists with those third-parties for access to their conduits, which are used to passively transport Sky Angel's programming from the headends in New York City and Palo Alto to customers' homes. Sky Angel subscribers pay for the right to use their broadband Internet connections as they see fit, so any requirement that Sky Angel or other video programming distributors also enter into agreements with Internet service providers would allow them to insist upon double payment for a single service.

In reality, Sky Angel inarguably "makes available" video programming as that term is used in the MVPD definition. The Commission has made clear that the critical factor in determining whether an entity makes video programming "available" is direct contact with consumers because Congress intended to promote competition among MVPDs at the retail level.[170] For instance, when there is more than one entity in the chain of distribution paths, the

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[168] *See* Public Notice, ¶ 9 (quoting *Section 302 Recon. Order*, 11 FCC Rcd at 20301). *See also AFL-CIO*, 777 F.2d at 759 ("[A]dministrative agencies are generally under an obligation to follow their own regulations, procedures and precedents.") (internal quotation marks omitted); *Alaska Prof. Hunters Ass'n, Inc. v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999) ("Once an agency gives its regulation an interpretation, it can only change the interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.").

[169] *See* John Horrigan, *Broadband Adoption and Use in America*, p. 14 (OBI Working Paper No. 1, 2010).

[170] *See World Satellite Network, Inc. v. Tele-Communications, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 13242, ¶ 25 (1999) ("[I]n adopting the program access provisions, we believe that Congress meant to promote

Commission applies the MVPD designation to the entity "directly selling programming and interacting with the public."[171] Sky Angel enters into contracts with programmers whereby it obtains the rights to distribute their programming in return for payments made on a per-subscriber basis, it distributes this programming to its customers for a fee, and it directly handles all customer service aspects of its business.[172] In other words, Sky Angel actively participates "in the selection and distribution of video programming."[173] Sky Angel therefore "makes available for purchase, by subscribers or customers, multiple channels of video programming."[174]

VIII. THE PUBLIC INTEREST REQUIRES THAT SKY ANGEL'S INNOVATIVE SERVICE BE CLASSIFIED AS AN MVPD ENTITLED TO THE PROTECTIONS OF THE PROGRAM ACCESS RULES

In this era of dramatically increasing access to, and use of, high-speed broadband connections, the public interest requires that an innovative company such as Sky Angel, which is attempting to use broadband technology to distribute exclusively family-friendly programming at

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competition among MVPDs at the retail level so that subscribers or customers could receive the benefits of that competition through more programming choices at lower prices.").

[171] *Program Carriage NPRM*, 7 FCC Rcd at 8065; *see id.* ("[I]t would appear consistent with the objectives of the 1992 Act for the obligation [to obtain retransmission consent] to inure to the distributor in the chain that interacts directly with the public."); *Program Carriage Order*, 8 FCC Rcd at 2998 ("That responsibility [to obtain retransmission consent] should fall upon the entity choosing the programming and receiving the subscription fees for providing it.").

[172] *See Wizard Programming, Inc. v. Superstar/Netlink Group, L.L.C.*, Memorandum Opinion and Order, 12 FCC Rcd 22102, 22109-10 (1997) ("Wizard is neither an MVPD nor a buying agent of an MVPD. Wizard does not purchase or sell programming, and it does not make programming available for purchase by subscribers."); *id.* at 22111 ("The programming Wizard markets is acquired by SNG from programming vendors, and SNG assembles the various programming packages… [T]he new subscriber calls a telephone number that is answered by SNG operators. SNG employees close all sales of programming packages marketed by Wizard, initiate service to the customer, and handle billing and other customer service needs of subscribers that purchase Wizard-brand programming. Subscribers pay SNG, not Wizard, for programming marketed to them by Wizard. It is SNG, therefore, and not Wizard, that makes the programming available to subscribers.").

[173] *See Telephone Company-Cable Television Cross-Ownership Rules*, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 5069, ¶¶ 15-16 (1992) ("We believe that it is more consistent with Congressional intent to interpret the term 'transmission' as requiring active participation in the selection and distribution of video programming."); *NCTA v. FCC*, 33 F.3d 66, 71-72 (D.C. Cir. 1994) ("'[T]ransmitting' a video signal implies at least choosing the signal, or originating it, not necessarily conducting it personally to its destination. The telephone company is merely a conduit for those signals that originate with and are chosen by the caller or, in this case, the video programmer. The Congress that enacted the Cable Act was undoubtedly full of members to whom this is just as obvious as it is to is.").

[174] 47 U.S.C. §522(13) (emphasis added).

affordable rates, receives the benefits of the program access rules because, ultimately, it will be the American public that benefits. As the Commission has recognized, permitting new types of video programming distributors to obtain the program access protections "can provide the competitive benefits that Congress sought to achieve: market entry by new service providers, enhanced competition, streamlined regulation, investment in infrastructure and technology, diversity of programming choices and increased consumer choice."[175]

Although the program access rules apply only to vertically-integrated programmers, access to this type of programming is particularly important for competing distributors because "cable operators still own popular programming for which there are no close substitutes."[176] As a result, "such programming is necessary for viable competition in the video distribution market."[177] Clearly, even though Sky Angel has managed to secure the carriage of various other programming networks, Discovery's continued withholding of its programming has harmed Sky

[175] *Section 302 Order*, 11 FCC Rcd at 18227; *see* Department of Justice, *U.S., et al. v. Comcast Corp., et al.*, Complaint, Case 1:11-cv-00106, ¶ 39 (filed Jan. 18, 2011) ("*DOJ Complaint*") ("[S]uccessful exclusion … of video distribution rivals would likely harm competition by allowing Comcast to obtain or (to the extent it may already possess it) maintain market power."); *DOJ Competitive Impact Statement*, p. 27 ("Because Comcast would face less competition from other video programming distributors, it would be less constrained in its pricing decisions and have a reduced incentive to innovate. As a result, consumers likely would be forced to pay higher prices to obtain their video content or receive fewer benefits of innovation. They also would have fewer choices in the types of content and providers to which they would have access, and there would be lower levels of investment, less experimentation with new models of delivering content, and less diversity in the types and range of product offerings.").

[176] *2007 Program Access Order*, 22 FCC Rcd at 17816; *see 2002 Program Access Order*, 17 FCC Rcd at 12139 ("[A] considerable amount of vertically integrated programming in the marketplace today remains 'must have' programming to most MVPD subscribers… [G]iven the unique nature of cable programming, there frequently are not good substitutes available for vertically integrated programming services…"); *DIRECTV Transfer Order*, 23 FCC Rcd at 3300 ("Liberty Media and Discovery each control popular programming networks … without close substitutes.").

[177] *2007 Program Access Order*, 22 FCC Rcd at 17820; *see 2002 Program Access Order*, 17 FCC Rcd at 12139 ("[A]n MVPD's ability to provide a service that is competitive with the incumbent cable operator is significantly harmed if the MVPD is denied access to popular, vertically integrated programming for which no good substitute exists.").

Angel's ability to retain[178] and attract subscribers,[179] and thus become the viable competitive alternative Congress intended.[180]

For a new service like Sky Angel, these harms are exacerbated because "vertically integrated programming is essential for new entrants in the video marketplace to compete effectively."[181] Thus, if vertically-integrated programmers are permitted to withhold programming, "they can significantly impede the ability of new entrants to compete effectively in the marketplace"[182] and thereby provide the competitive benefits Congress sought to achieve. The Commission therefore must strive to protect emerging competitors from these anti-competitive practices, particularly because "vertically integrated programmers may have an even greater economic incentive to withhold programming from these recent entrants in the video marketplace. Because recent entrants have minimal subscriber bases … the costs that a cable-

[178] *See 2002 Program Access Order*, 17 FCC Rcd at 12139 ("We agree with the competitive MVPDs' assertion that if they were to be deprived of only some of this 'must have' programming, their ability to retain subscribers would be jeopardized."); *2007 Program Access Order*, 22 FCC Rcd at 17818 ("[S]ome nationally distributed networks are sufficiently valuable to viewers such that some viewers may switch to an alternative MVPD if the popular programming were not made available on their current MVPD."); *see DOJ Complaint*, ¶ 6 ("The public outcry when certain programming is unavailable, even temporarily, underscores the damage that can occur when a video distributor loses access to valuable programming.").

[179] *See 2002 Program Access Order*, 17 FCC Rcd at 12139 ("[E]ven if an acceptable substitute is found, the competitive MVPD is still harmed because its competitor can likely offer to subscribers both the unavailable programming and its substitute."); *2007 Program Access Order*, 22 FCC Rcd at 17819 ("[W]ithholding can have a significant impact on subscribership to rival MVPDs."); *id.* ("Such practices, in turn, predictably harm competition and diversity in the distribution of video programming, to the detriment of consumers."); *DOJ Complaint*, ¶ 5 ("Attractive content is vital to video programming distribution… Distributors compete for viewers by marketing the rich array of programming and other features available on their services.").

[180] *See 2007 Program Access Order*, 22 FCC Rcd at 17816 ("[V]ertically integrated programming, if denied to cable's competitors, would adversely affect competition in the video distribution market."); *id.* at 17817 ("[A]ccess to this non-substitutable programming is necessary for competition in the video distribution market to remain viable.").

[181] *Id.* at 17819 (emphasis added); *see 2002 Program Access Order*, 17 FCC Rcd at 12136 ("In enacting the program access provisions of the 1992 Cable Act, Congress indicated that it deemed vertically integrated programming to be vital to the success of new entrants…") (emphasis added).

[182] *2007 Program Access Order*, 22 FCC Rcd at 17820.

affiliated programmer would incur from withholding programming from recent entrants are negligible."[183]

Moreover, the emergence of competition from distributors such as Sky Angel is vitally important because "[e]ntry into traditional video programming distribution is expensive, and new entry is unlikely in most areas."[184] As a result, "Internet-based offerings are likely the best hope for additional video programming distribution competition."[185] For this reason, cable operators have an even stronger incentive to withhold affiliated programming from this particular type of emerging competitor.[186] The FCC therefore should not impose unreasonable and unintended restrictions on a new entity such as Sky Angel which requires the protections of the program access rules because doing so would limit competition without producing any discernible public interest benefits.[187]

On the other hand, expanded competition from innovative new services utilizing broadband Internet connections "has the potential to increase consumers' choice of video

[183] *Id.* at 17832-33.

[184] *DOJ Complaint*, ¶ 9; *see DOJ Competitive Impact Statement*, p. 28 ("Over the last decade, Comcast and other traditional video distributors benefited from an industry with limited competition and increasing prices, in part because successful entry into the traditional video programming distribution business is difficult and requires an enormous investment to create a distribution infrastructure such as building out wireline facilities or obtaining spectrum and launching satellites. Accordingly, additional entry into wireline or DBS distribution is not likely in the foreseeable future.").

[185] *DOJ Complaint*, ¶ 9.

[186] *See id.* at ¶ 54 ("Comcast has an incentive to encumber, through its control of the JV, the development of nascent distribution technologies and the business models that underlie them…"); *DOJ Competitive Impact Statement*, p. 19 ("Many internal documents reflect Comcast's assessment that OVDs are growing quickly and pose a competitive threat to traditional forms of video programming distribution."); *Comcast Order*, ¶ 85 ("[M]any of the other cable companies are similarly concerned about the OVD threat and [] NBCU feels pressure to avoid upsetting those companies with respect to any actions it might take regarding the online distribution of its content.").

[187] *See 2007 Program Access Order*, 22 FCC Rcd at 17842 ("Section 628 makes no distinction among MVPDs of the kind suggested by these commenters. Moreover, we find that adopting such restrictions on the entities that can benefit from the prohibition will limit competition in the video distribution market and will result in no discernible public interest benefits.").

providers, enhance the mix and availability of content, drive innovation, and lower prices."[188] Increased competition from these MVPDs also "will encourage broadband adoption, consistent with the goals of the Commission's National Broadband Plan."[189]

Promoting the entry and continued viability of additional competitors also benefits content providers. Increased demand from numerous distributors provides programmers greater negotiating leverage with respect to the terms and conditions of carriage. It also expands the reach of their content, and thereby increases overall license fees and advertising revenues.[190] In other words, every content provider should support a broad interpretation of "MVPD" in order to allow a service such as Sky Angel to become a viable competitor,[191] unless the programmer is influenced by the anti-competitive motives of an affiliated MVPD.[192] In short, Sky Angel is a perfect example of a video distributor which qualifies as an MVPD, with program access rights, and Discovery is a perfect example of a programmer acting contrary to its own economic interests in order to crush potential competition and thereby benefit an affiliated MVPD.

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[188] *Comcast Order*, FCC 11-4, ¶ 62.

[189] *Id.*

[190] *DOJ Competitive Impact Statement*, p. 23 ("A stand-alone programmer typically attempts to maximize the combined license fee and advertising revenues from its programming by making its content available in multiple ways.").

[191] In this respect, Sky Angel notes that a non-vertically-integrated programmer need not worry that it will become subject to the program access rules simply because it offers programming, even for a fee, on its own or an affiliated website. First, as noted, Sky Angel distributes programming in part through its subscribers' broadband Internet connections, not via a website, so a proper, particularized determination that Sky Angel qualifies as an MVPD would not affect the status of web-based distributors. Second, because Congress intended for "multiple channels of video programming" to mean "multiple pre-scheduled, real-time, linear streams of network programming," a service providing web-based on-demand programming would not qualify as an MVPD. Third, the program access requirements only apply to programmers vertically-integrated with cable operators, not generally with any MVPD (unless the Commission imposes such requirements in approving a merger).

[192] *See id.* at 23 ("Unlike a stand-alone programmer, Comcast's pricing and distribution decisions will take into account the impact of those decisions on the competitiveness of rival MVPDs. As a result, Comcast will have a strong incentive to disadvantage its competitors by denying them access to valuable programming or raising their licensing fees above what a stand-alone NBCU would have found it profitable to charge."); *id.* ("The JV would continue to value widespread distribution of NBCU content, but it also would likely consider how access to that content makes Comcast's MVPD rivals better competitors.").

If the Commission incorrectly determines that a service such as Sky Angel fails to qualify as an MVPD, not only will it decrease the broad pro-consumer benefits of the program access regime, it will strip itself of the authority necessary to adequately regulate various "traditional" MVPDs, including cable operators, that may use a broadband Internet connection as a link in their distribution chains.[193] In turn, this would undermine the Commission's recent efforts to "facilitate competition in the video distribution market" by eliminating other alleged loopholes to application of the program access rules.[194] In addition, forcing Congress to act each time a new distribution technology emerges simply is bad public policy that would deter investment in innovative technologies and impede competition. It was for this reason Congress enacted a broad MVPD definition and program access requirements. Otherwise, vertically-integrated programmers could permissibly discriminate against innovative competitors such as Sky Angel, whose particular service could not have been envisioned twenty years ago when Congress drafted the Cable Act.[195]

Finally, Sky Angel recognizes the practical limitations that may prevent the Commission from providing the full benefits of its program access rules to every new video programming distributor. For instance, the Commission may justifiably hesitate to apply the program access protections to the operator of a website that offers unencrypted video programming via a publicly

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[193] For instance, a cable system that offers Internet access to its cable subscribers may be able to sidestep various Commission rules designed to protect consumers that apply to programming on cable systems or even to MVPDs, but not as clearly to other types of video distributors. Assuming the system has the necessary copyright licenses and programming agreements, what had been deemed a cable system may choose instead to distribute its programming to a subscriber's home via the Internet or simply "re-classify" its last-mile connection as a broadband connection.

[194] *See Terrestrial Programming Order*, 25 FCC Rcd at 749-750. The Commission could lose its regulatory authority over the operations of such MVPDs as DISH, Comcast and Cablevision, which already offer distribution of live, linear channels over the Internet through various "TV Everywhere" offerings.

[195] *See* Edward J. Markey, *Cable Television Regulation: Promoting Competition in a Rapidly Changing World*, 46 Fed. Comm. L.J. 1, pp. 1-2 (1993-94) ("The convergence of the computer chip, the laser and fiber optics, digitization, and satellites are revolutionizing the telephone, cable, and broadcasting industries and driving our society towards a multimedia future that most of us can dimly imagine.") (emphasis added). Rep. Markey was the "Chairman of the House Subcommittee on Telecommunications and Finance and a principal author of the Cable Television Consumer Protection and Competition Act of 1992." *Id.* at 1.

accessible website. The extremely limited investment required for this type of service, as well as the lack of proprietary equipment and control by the distributor, could lead to unintended legal and regulatory consequences. This possibility must not, however, permit a vertically-integrated programmer such as Discovery to impermissibly withhold its programming from a service such as Sky Angel, which simply delivers encrypted programming across a broadband Internet connection as one component of its distribution system. Sky Angel's system requires an extensive amount of hardware and technology to capture, prepare, and distribute multiple linear programming networks to its subscribers. In addition, in order to receive the service, a proprietary set-top box must be connected to each television set intended to receive Sky Angel's service. This system is in stark contrast to a web-based video provider, which simply needs to access a server and create a publicly available website. Accordingly, a particularized finding that Sky Angel is an MVPD for purposes of the program access rules would only permit a limited number of additional entities to claim similar rights while still advancing Congress' goal of increased competition.

IX. CONCLUSION

Based on the foregoing, the Commission cannot reasonably, or legally, determine that Sky Angel fails to qualify as an MVPD entitled to the pro-consumer, pro-competition protections of the program access rules. Thus, because Discovery's withholding of programming from Sky Angel's subscribers and potential subscribers is clearly a discriminatory act in violation of the program access rules, the Commission should promptly find in favor of Sky Angel and grant all relief requested in its Complaint.

Respectfully submitted,

SKY ANGEL U.S., LLC

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May 14, 2012

Its Attorneys

Attachment B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Public Notice on Interpretation of the Terms	)	MB Docket No. 12-83
"Multichannel Video Programming Distributor"	)	
and "Channel" as Raised in Pending	)	
Program Access Complaint Proceeding	)	
	)	
Complaint of Sky Angel U.S., LLC	)	MB Docket No. 12-80
Against Discovery Communications, LLC, *et. al.*	)	
For Violation of the Commission's Competitive	)	
Access to Cable Programming Rules	)	

REPLY COMMENTS OF SKY ANGEL U.S., LLC

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TABLE OF CONTENTS

EXECUTIVE SUMMARY……..…….…ii

I. INTRODUCTION…….…….….2

II. A PARTICULARIZED FINDING THAT SKY ANGEL QUALIFIES AS AN MVPD WOULD NOT HAVE FAR-REACHING IMPLICATIONS…….....……... 9

III. AN MVPD NEED NOT BE FACILITIES-BASED OR PROVIDE ALL NECESSARY TRANSMISSION PATHS…….....……12

IV. THE COPYRIGHT OFFICE DECISION THAT INTERNET-BASED DISTRIBUTORS DO NOT QUALIFY FOR THE CABLE COMPULSORY LICENSE IS IRRELEVANT HERE……...……..……..……..……21

V. CONGRESS USED THE PHRASE "MULTIPLE CHANNELS OF VIDEO PROGRAMMING" TO MEAN "MULTIPLE NETWORKS OF VIDEO PROGRAMMING"…..…..…….…….…….….26

VI. THE PUBLIC INTEREST REQUIRES THAT SKY ANGEL'S INNOVATIVE SERVICE BE CLASSIFIED AS AN MVPD ENTITLED TO THE PROTECTIONS OF THE PROGRAM ACCESS RULES……..…….……... 30

VII. CONCLUSION…….…….. 37

EXECUTIVE SUMMARY

Sky Angel U.S., LLC ("Sky Angel") provides an affordable, nationwide, subscription-based service of approximately eighty linear channels of exclusively family-friendly video and audio programming, including many of the nation's most popular non-broadcast networks. Sky Angel's securely encrypted programming can only be accessed through its proprietary set-top box, which receives the programming streams through a subscriber's broadband Internet connection and which attaches directly to a television set.

As Sky Angel detailed in its initial comments, its innovative service is exactly the type of competitive alternative to cable that Congress sought to encourage when it created a broad, open-ended definition of a multichannel video programming distributor ("MVPD") and enacted the program access requirements to protect emerging competitors from the monopolistic practices of entrenched cable operators and their affiliated programmers. Sky Angel provided extensive legislative history and Commission and judicial precedent demonstrating beyond a doubt that, in order to qualify as an MVPD entitled to the protections of the program access rules, an entity need not be "facilities-based" or provide all necessary transmission paths for the distribution of its programming. Congress' repeated use of the term "channel," in an everyday sense, to mean a "programming network," as well as the fact that a non-facilities-based distributor is expressly identified in the statutory definition of an MVPD, leaves no room for a different interpretation. Moreover, Congress' primary goal was to benefit consumers by increasing competition in the video distribution marketplace. Exactly like a cable system, Sky Angel's subscription service provides multiple networks of live, linear video programming that are accessed on a television set through a set-top box. Accordingly, from a consumer perspective, Sky Angel offers a

functionally identical service, and therefore provides the exact type of competition Congress intended.

A majority of commenters representing a broad array of participants in the video distribution marketplace, but of course excluding the incumbent cable industry, similarly urged the Commission to interpret the MVPD definition in accordance with its express statutory terms, and in the manner Congress intended, and thus find that Sky Angel qualifies as an MVPD entitled to the protections of the program access rules. As detailed below, in addition to agreeing with Sky Angel that, as a matter of law, the Commission is foreclosed from interpreting the MVPD definition to require that an entity be facilities-based or provide all necessary transmission paths, these commenters detailed, and fully supported, why a finding that Sky Angel qualifies as an MVPD would substantially advance the public interest, including by increasing competition (and thereby encouraging innovation and lowering subscription rates), promoting programming diversity, encouraging broadband adoption, ensuring regulatory parity, and increasing the distribution, and thus revenue, of content providers, including broadcasters.

In contrast, if the Commission improperly excludes all Internet-based distributors from the scope of the MVPD definition, various negative consequences would follow that go well beyond the "traditional" MVPD marketplace. For instance, entrenched MVPDs could prevent new entrants from being first-to-market in the next generation MVPD marketplace, and thereby monopolize that market in a way Congress intended to prevent with respect to the video distribution market in general. And, in the process, they could simply "opt out" of the various consumer-oriented FCC regulations applicable to MVPDs. At the same time, the imposition of these regulations, which are not nearly as expansive or burdensome as some commenters claim, would subject only a small number of Internet-based distributors to the Commission's rules

because, with respect to Sky Angel's program access dispute, as well as the Public Notice that arose out of that dispute, the Commission should tailor its decision to the specific facts of Sky Angel's service. Even if the Commission makes a determination broader than Sky Angel's particular service, the effects of that decision still would be narrow in scope because of the limits imposed by the express language of the statutory definition of an MVPD.

The statutory language, legislative history, and Commission precedent all clearly and indisputably lead to a single conclusion – that an entity need not be facilities-based or provide all necessary transmission paths to qualify as an MVPD entitled to the protections of the program access rules. As a result, an entity such as Sky Angel, which fully meets all of the express statutory requirements and which provides a service functionally identical to "traditional" MVPDs from a consumer perspective, qualifies as an MVPD as a matter of law. The Commission has had all necessary precedent in this respect before it for nearly twenty years, and now also has additional public comment that clearly supports the proposed, and proper, interpretation that an MVPD is any entity that "makes available for purchase, by subscribers or customers, multiple networks of video programming" regardless of the particular distribution technologies it uses. Because the Commission has a legal duty to expeditiously resolve Sky Angel's program access complaint,[1] and because Discovery's withholding of programming from Sky Angel's subscribers and potential subscribers is clearly a discriminatory act in violation of the program access rules, the Commission should immediately find in favor of Sky Angel and grant all of the relief requested in its program access complaint.

[1] *See* 47 U.S.C. §548(f) ("The Commission's regulations shall – (1) provide for an expedited review of any complaints made pursuant to this section") (emphasis added).

Before the
FEDERAL COMMUNICATIONS COMMISSION
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"Multichannel Video Programming Distributor"	)	
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For Violation of the Commission's Competitive	)	
Access to Cable Programming Rules	)	

REPLY COMMENTS OF SKY ANGEL U.S., LLC

Sky Angel U.S., LLC ("Sky Angel") submits these reply comments in response to the Public Notice released by the Media Bureau (the "Bureau") on March 30, 2012 in the above-captioned proceeding and the comments filed in response to the Public Notice. As detailed in its initial comments, and as further demonstrated by other commenters, Sky Angel's innovative service clearly fits within the express terms of the broad, open-ended statutory definition of a multichannel video programming distributor ("MVPD"), which Congress enacted to increase competition in the video distribution marketplace for the benefit of consumers. Further, as Sky Angel's dispute with Discovery Communications, LLC ("Discovery") demonstrates,[1] this type of emerging programming distributor requires the program access rules to protect them from the anti-competitive actions of entrenched MVPDs and their affiliated programmers. Unfortunately, with the Public Notice, the Commission seems so preoccupied with resolving the claims made by Discovery in defending its anti-competitive actions towards Sky Angel, the Commission appears

[1] Discovery's actions towards Sky Angel refute the claim made by the Motion Picture Association of America ("MPAA") that the FCC need not intervene because the "market is working well." *See* Comments of MPAA at 3.

to have lost sight of Congress' fundamental goal – to assure consumers the benefits of competition that can only emerge if potential competitors have fair access to programming.[2] The Commission also has ignored its own commitment to resolve program access complaints within five months.[3]

I. INTRODUCTION

As a matter of law, the Commission must interpret "channels" to require only that an entity "make[] available for purchase, by subscribers or customers, multiple [networks] of video programming" in order to qualify as an MVPD entitled to the pro-competition, pro-consumer protections of the program access rules. The alternate proposal – that an entity must be "facilities-based" and provide all necessary transmission paths – would conflict directly with the statutory definition of an MVPD, which expressly includes a non-facilities-based distributor as an example. Likewise, the Commission has previously held that an entity need not be facilities-based or otherwise operate the vehicle for distribution to qualify as an MVPD. Nor can a cable-specific definition of "channel" be reconciled with the various non-cable entities specifically and traditionally defined as MVPDs. And, as Sky Angel detailed in its initial comments, Congress and the Commission contemporaneously understood and repeatedly used the term "channel" to mean "programming network." This interpretation also substantially advances the public interest goals Congress sought to achieve in enacting the program access regime, while the alternate proposal would continue to permit entrenched MVPDs to discriminate against emerging competitors and further secure their current market dominance.

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[2] *See* Comments of Public Knowledge at 14 ("[T]he problem [Congress] sought to solve – consumer harms caused by a lack of sufficient competition – persists today. And the solution is the same: a service-oriented approach to the video market that permits MVPDs using any technology to compete with established cable systems.").

[3] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 13 FCC Rcd 15822, 15841 (1998) ("[T]he adoption of time limits for the resolution of program access disputes can enhance competition in the video marketplace by providing certainty to program access litigants that their complaints will be timely resolved."); *id.* at 15842 ("[D]enial of programming cases … should be resolved within five months of the submission of the complaint to the Commission.").

A majority of commenters, including other Internet-based video programming distributors, the broadcasting industry, public interest and consumer groups, a writers' labor organization, a "traditional" MVPD, and a more recent entrant into the MVPD marketplace, similarly urged the Commission to interpret the MVPD definition in the manner Congress intended. For instance, the Affiliates Associations explained that "[t]he expansive language of Section 602(13) of the Act is sufficiently broad, on its face, to bring within its reach entities that distribute multiple streams of linear programming to subscribers via an Internet broadband connection."[4] DIRECTV noted that the alternative "interpretation, which would require an MVPD to supply a 'transmission path,' is foreclosed as it would conflict directly with the statutory definition."[5] And Public Knowledge urged the Commission to "clarify that online video providers such as Sky Angel are 'multichannel video programming distributors'" because "[o]nly a technology-neutral reading of the term is consistent with the text and purpose of the Communications Act."[6]

Likewise, Syncbak explained that, because the "definitions at issue were adopted well before the availability of residential broadband service capable of supporting a robust MVPD service," the Commission "should read those definitions in view of the underlying policy goals of promoting competition and consumer choice… The policy goal should be to best serve consumers, not to interpret old definitions and rules that were intended to foster competitive

[4] Comments of ABC Television Affiliates Ass'n, CBS Television Network Affiliates Ass'n, and NBC Television Affiliates ("Affiliates Associations") at 2; *see id.* at iv ("The expressly open-ended and flexible statutory definition of 'MVPD' should be read to account for technological developments in the years since its 1992 enactment."); *id.* at 4 ("It is unsurprising the illustrative list does not include online or Internet-based video programming distributors, as the 1992 Cable Act preceded widely available broadband Internet access by many years.").

[5] Comments of DIRECTV, LLC at 2.

[6] Comments of Public Knowledge at 1; *see id.* ("[T]his reading is consistent with the technologically-neutral approach Congress has taken to video competition since the Cable Television Consumer Protection and Competition Act of 1992, and as such, no statute stands in the way of this pro-consumer, pro-competitive understanding of the law."); Comments of Telecommunications for the Deaf and Hard of Hearing, Inc., National Ass'n of the Deaf, American Foundation for the Blind, Deaf and Hard of Hearing Consumer Advocacy Network, Hearing Loss Ass'n of America, and Ass'n of Late-Deafened Adults ("Consumer Groups") at iii (urging "the Bureau to reject a technical interpretation of MVPDs that would depend on a narrow, cable-specific understanding of 'channels.'").

services in a way that erects new barriers to entry."[7] The Writers Guild of America, West ("WGA") similarly recognized that the "inclusion in the MVPD definition of entities that make use of third-party facilities to provide video programming would be consistent with Congressional intent to enhance competition in video programming distribution."[8] And the Consumer Groups noted that this common-sense interpretation would "encompass[] all entities, including Sky Angel, that deliver what consumers understand to be multiple 'channels' of programming."[9]

In contrast, all comments filed by cable operators, as well as its trade association, urged the Commission to adopt a narrow, technology-specific MVPD definition, and thereby constrain a new type of competition from emerging video programming distributors like Sky Angel. But these arguments are not surprising considering that the cable industry has always engaged in this sort of anti-competitive tactic. For instance, leading up to Congress' vote on the 1992 Cable Act, Senator Metzenbaum, who co-sponsored the Senate bill, noted that "[t]he cable industry is howling about the conference report precisely because it will curb their monopoly power. That is why the industry has launched a deceptive propaganda campaign which distorts the truth about this legislation."[10] Similarly, Senator Gorton, another co-sponsor, noted that "[t]he access to

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[7] Comments of Syncbak, Inc. at 12; *see id.* at 1 ("Syncbak urges the Bureau to acknowledge that 'channels' and MVPD services can be provided through Internet distribution if those services look and function like traditional MVPD services provided over other platforms.").

[8] Comments of WGA at 1.

[9] Comments of Consumer Groups at iii; *see* Comments of Saga Communications, Inc. at 2 ("Whether programming content is delivered by cable, satellite, MMDS, or the Internet, is irrelevant to the consumer. Thus, whether the entity offers a transmission path is irrelevant to whether it qualifies as an MVPD."); Comments of M3X Media, Inc. at 5-6 ("Irrespective of whether the 'multiple channels of video programming' are provided via traditional MVPDs or by online multichannel video distributors, they function equivalently as systems for multichannel video distribution."); Comments of Affiliates Associations at 6 ("Common sense dictates that distributors delivering via the Internet programming streams similar to the programming delivered by 'traditional' MVPDs should be considered MVPDs as well, without regard for the mechanics of the delivery of those programming streams…").

[10] 138 Cong. Rec. S14252, S14252, 1992 WL 231938 (Sept. 21, 1992) (statement of Sen. Metzenbaum); *see* 138 Cong. Rec. S13576, S13577, 1992 WL 225917 (Sept. 16, 1992) (statement of Sen. Metzenbaum) ("The vehemence and the scope of cable's disinformation campaign represents the last, desperate act of a monopoly struggling to maintain its unbridled authority over consumers."); 138 Cong. Rec. H8671, H8677, 1992 WL 228239 (Sept. 17,

programming … provisions are critically important tools to promote competition. No wonder this is the single provision cable has fought the hardest. Once again, cable fears an end to its monopoly."[11]

Commission rulemaking proceedings implementing the 1992 Cable Act also demonstrate that the cable industry will argue whichever way best suits its present anti-competitive interests, and thus, its continued market dominance. For instance, shortly after enactment of the 1992 Cable Act, the Commission sought comment regarding the new cable rate regulation provisions, which "permit[] regulation of a cable system's subscriber rates only if th[e] Commission finds that the cable system is 'not subject to effective competition.'"[12] Because two of the three tests used to determine whether a cable system is subject to effective competition, and therefore cannot be rate regulated, involve competition from other MVPDs in the cable system's local franchise area, the Commission specifically sought comment on what services qualify as MVPDs for this purpose.

In response, the cable industry uniformly argued in favor of a broad interpretation of the MVPD definition, as this would make it less likely that the Commission could regulate its rates. For instance, Tele-Communications, Inc. ("TCI"), whose CEO at the time was John Malone (and

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1992) (statement of Rep. Cooper) ("We have witnessed one of the most unscrupulous lobbying campaigns of modern times. Every cable customer has gotten a misleading flier, and there have been countless cable ads that are terribly misleading. We need to stand up for the truth in this body. We need to stand up for competition.").

[11] 138 Cong. Rec. S14222, S14247, 1992 WL 231936 (Sept. 21, 1992) (statement of Sen. Gorton); *see id.* (statement of Sen. Gorton) ("The cable industry has spent millions of dollars launching what I would consider to be a massive misinformation campaign to confuse consumers and to cloud the issues because that industry recognizes that this bill is going to result in the one set of features which it most fears: Consumer choice, an end to the cable television monopoly and what every other unregulated business in America already faces, competition."); 138 Cong. Rec. S13467, S13467, 1992 WL 224280 (Sept. 15, 1992) (statement of Sen. Lieberman) ("It is especially important now for all of us who support this measure to speak out on the strengths of the legislation in view of the massive and misleading advertising campaign that the cable industry is conducting against it.").

[12] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation*, Notice of Proposed Rulemaking, 8 FCC Rcd 510, 512 (1992).

who now is in control of Discovery),[13] argued that "[t]he plain language of the Act establishes that the term multichannel video programming distributor be broadly construed" because it "states explicitly that Congress' list of multichannel video programming distributors is illustrative, not exhaustive."[14] TCI further noted that "[a] broad definition of multichannel video programming distributor would serve the statutory goal, and enable the FCC to accommodate future advances."[15] TCI also weighed in on two other issues at the center of the current proceeding – namely, the definition of "channel" and the need for an entity to be "facilities-based" to qualify as an MVPD. Specifically, TCI urged that "[a]ny distributor offering multiple video programming choices to viewers should reasonably be considered a multichannel video programming distributor."[16] It also recognized that "[t]he statutory definition of a multichannel video programming distributor does not mandate that a distributor be facilities-based as a prerequisite to inclusion in the statutory definition. Rather, by including TVRO distributors in the definition Congress has recognized that video programming distributors exist in various forms."[17]

Likewise, Continental Cablevision argued that "[t]he plain language of the 1992 Act establishes that the term 'multichannel video programming distributor' is to be broadly construed," noting that "[t]he statute states explicitly that Congress' list of multichannel video programming distributors is illustrative, not exhaustive."[18] Continental Cablevision added that

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[13] *See News Corp. and The DIRECTV Group, Inc., Transferors, and Liberty Media Corp., Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 23 FCC Rcd 3265, 3300-01 (2008).

[14] Comments of TCI, MM Docket No. 92-266, p. 13 (Jan. 27, 1993) (emphasis added).

[15] *Id.* at 13-14.

[16] *Id.* at 14 (emphasis added).

[17] *Id.* (emphasis added).

[18] Comments of Continental Cablevision, Inc., MM Docket No. 92-266, p. 6 (Jan. 27, 1993); *see* Reply Comments of Cablevision Industries Corporation, MM Docket No. 92-266, p. 35-36 (Feb. 11, 1993) ("The definition of an multichannel video programming distributor should be broad, and not restricted to service providers that offer the same or more programming as the cable operator.").

"[t]he adoption of a broad definition would also encompass future advances or rules changes."[19] Also like TCI, Continental Cablevision noted that "[n]othing in the statutory definition of a multichannel video programming distributor requires distributors to be 'facilities-based' before they can be included. In fact, by including TVRO distributors in the definition, Congress has already recognized the contrary."[20] Similarly, Comcast noted that "[t]he examples provided in section 602(12) … plainly reveal Congress' intent to include virtually any source of multichannel programming."[21] Comcast therefore urged "that the Commission make this determination not only with an eye on current market conditions, but with a view toward how, and how quickly, the world is changing."[22] And the California Cable Television Association, in discussing video dialtone services, argued that "[t]he fact that multiple channels of programming are available through a menu should satisfy the requirement of 'making multiple channels of video programming available.' The fact that it is delivered through only one or two channels is a technological distinction without a practical difference."[23] Even ***Discovery*** weighed in, urging the Commission to "define the term 'multichannel video programming distributor' as broadly as possible."[24]

The Commission also sought comment twenty years ago on the scope of the MVPD definition in its rulemaking proceeding implementing the Cable Act's retransmission consent provisions.[25] In response, "[c]ommenters generally agree[d] that the definition of 'multichannel

[19] Comments of Continental Cablevision, Inc., MM Docket No. 92-266, p. 7 (Jan. 27, 1993).

[20] *Id.* at 7 (emphasis added).

[21] Comments of Comcast Corporation, MM Docket No. 92-266, p. 12 (Jan. 27, 1993) (emphasis added); *see id.* at 7 ("[P]remium movie channels such as HBO and Showtime…") (emphasis added).

[22] *Id.* at 9.

[23] Reply Comments of the California Cable Television Association, MM Docket No. 92-266, p. 12 (Feb. 11, 1993).

[24] Comments of Discovery Communications, Inc., MM Docket No. 92-266, p. 4 (Jan. 27, 1993) (emphasis added).

[25] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, Notice of Proposed Rulemaking, 7 FCC Rcd 8055, 8065 (1992).

distributor' should be interpreted expansively, since such distributors are 'not limited to' the categories specifically enumerated."[26] For instance, a consortium of cable operators that jointly filed comments and Time Warner Entertainment, which at the time owned Time Warner Cable ("TWC"), both noted that "the statutory language is clear that the definition of a multichannel video programming distributor is not limited to the examples given and encompasses any person who makes available multiple channels of video programming for sale to subscribers."[27] In addition to the statutory language itself, these commenters noted that "the legislative history makes clear that the term 'multichannel video programming distributor' was to be interpreted broadly."[28] They also agreed that "[a]s long as all three elements of the statutory definition are met, *i.e.*, the entity: (1) makes available multiple channels of video programming (broadcast, non-broadcast or both); (2) for purchase; (3) by subscribers or customers, that entity qualifies as a multichannel video programming distributor…"[29]

In short, most commenters in this proceeding point out the obvious – that Sky Angel readily falls within the statutory definition of "MVPD" under the Commission's program access rules. In contrast, cable-based incumbent MVPDs and Discovery (which is under common control of incumbent MVPD interests), which oppose Sky Angel, have been forced to reverse their previous positions of record – that the MVPD definition is very broad and not dependent on being facilities-based. The Commission should give no weight to these incumbent MVPDs,

[26] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, 2996 (1993); *see id.* at 2997 ("[T]he list of multichannel distributors in the definition is not meant to be exhaustive…").

[27] Comments of Adelphia Communications Corp., *et al.*, MM Docket No. 92-259, pp. 23-24 (Jan. 4, 1993) (emphasis in original); Comments of Time Warner Entertainment Company, L.P., MM Docket No. 92-259, pp. 32-33 (Jan. 4, 1993) (emphasis in original).

[28] *Id.* at 24 & 33, respectively.

[29] *Id.*

which take an unsupported anti-competitive and anti-consumer position in direct contradiction to their opposite positions of record.[30]

II. A PARTICULARIZED FINDING THAT SKY ANGEL QUALIFIES AS AN MVPD WOULD NOT HAVE FAR-REACHING IMPLICATIONS

Certain commenters exaggerated the potential effect of a Commission finding that Sky Angel qualifies as an MVPD entitled to the pro-consumer benefits of the program access rules. For instance, Cablevision alleged that "de-coupling MVPD status from facilities ownership or control would effectively enable *anyone* to leverage the offering of a *handful of amateur video clips* into a right to demand access to high quality programming networks,"[31] and Comcast claimed that "vertically-integrated programming networks potentially would face program access claims from *thousands* of Internet video service providers."[32] In addition, Discovery argued that, "[i]f the same programming network is available through an *unknown and unlimited number* of online sources, that network's value to the facilities-based MVPD may be diminished, as may be the price the MVPD is willing to pay for it."[33] The Commission must not allow such absurd hyperbole to distract it from the particular facts of Sky Angel's service or skew the straight-forward statutory interpretation it must address with respect to Sky Angel's program access complaint.[34]

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[30] More than a year ago, Sky Angel requested that the Commission issue sanctions against Discovery for lack of candor in this proceeding, and to investigate whether Discovery affirmatively misrepresented its alleged "harm" at an early stage. *See* Motion of Sky Angel U.S., LLC for Imposition of Sanctions Against Discovery Communications, LLC for Lack of Candor and for Possible Misrepresentation (filed May 27, 2011). In addition, the Commission should consider Discovery's unexplained reversal of position as part of its consideration of Discovery's lack of candor in this proceeding.

[31] Comments of Cablevision Systems Corporation at 4 (emphasis added).

[32] Comments of Comcast Corporation at 10 (emphasis added).

[33] Comments of Discovery at 12.

[34] *See* Comments of Affiliates Associations at iii ("[T]he task of statutory construction in this instance is not complex.").

As Sky Angel noted in its comments, "a particularized finding that Sky Angel qualifies as an MVPD would not have 'far-reaching' implications… Sky Angel provides real-time, linear feeds of programming networks, identical to 'traditional' MVPDs, while most, if not all, other distributors that provide content via hardware connected to a broadband Internet connection offer only non-linear, on-demand content. In addition, unlike the vast majority of Internet-based video distributors, Sky Angel does not distribute programming on the World Wide Web, but rather relies in part on subscribers' broadband Internet connections as one path in its distribution system."[35] The particular facts of Sky Angel's service have been on record before the FCC for approximately two years, and in summary are:

- Sky Angel enters into definitive written agreements with program providers/rights holders for distribution of programming to Sky Angel subscribers via its IPTV system.
- Sky Angel enters into subscription relationships with consumers for multiple, live linear channels of programming, who are sent Sky Angel set-top boxes, which are necessary to receive programming from Sky Angel and which Sky Angel directly and remotely controls at all times.
- Sky Angel receives content from programmers, and then processes and encrypts it.
- Sky Angel transmits the encrypted programming to its headends via fiber it controls.
- The encrypted programming then is distributed to Sky Angel subscribers, in part through Internet connections which those subscribers have contracted for from ISPs.
- The programming is received by the Sky Angel set-top boxes, decrypted, and then transmitted to subscribers' television sets with industry-standard copy protections.
- At no time is the World Wide Web, or home computers, part of the Sky Angel service.
- Sky Angel exclusively controls the origination, distribution, and reception of all programming, and at no time may anyone receive the programming except authorized subscribers via their authenticated set-top boxes.

Therefore, a decision appropriately tailored to the specific facts of Sky Angel's service, which is all the program access dispute proceeding calls for at this stage, likely would affect only Sky Angel at this time, and would never affect "thousands," or "an unknown and unlimited

[35] Comments of Sky Angel at 8.

number," of video programming distributors. Commenters on both sides of the issues presented in the Public Notice agree that this limited finding is the most appropriate course for the Commission to take at this time.[36]

In the alternative, if the Commission feels compelled to interpret the MVPD definition with respect to services different from Sky Angel, and thereby expand the proper scope of the proceeding, or otherwise consume additional time (it took the FCC approximately two years, and scrutiny from the D.C. Circuit, to even assign a docket or file number to Sky Angel's complaint), then it should immediately grant Sky Angel's *Renewed Petition for Temporary Standstill*, which was filed in May 2011 but never acted on by the Commission. Only then would Sky Angel not be substantially, and unnecessarily, prejudiced by the broader scope of any Commission inquiry or unwarranted continuing delay. Grant of a standstill would be without prejudice to any ultimate decision on the merits.

Moreover, even if the Commission makes a determination broader than Sky Angel's particular service, the exaggerated concerns of some commenters still would be unwarranted because the effects of that decision also would be limited in scope. As DIRECTV noted, the MVPD definition:

> [I]dentifies at least three important qualifications for an MVPD. First, it must offer programming 'for purchase.' Accordingly, web sites and other sources that offer programming for free would not qualify. Second, it must offer programming for purchase 'by subscribers or customers.' Accordingly, wholesalers and resellers would not qualify. Third, it must offer multiple 'channels of video programming,' which means that entities that do not provide multiple video programming networks (as opposed to a single network or individual programs or movies) would not qualify.[37]

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[36] *See, e.g.*, Comments of Open Internet Coalition at 1 ("[T]he Commission should focus narrowly on the issues presented in the program access complaint filed by Sky Angel U.S., LLC ('Sky Angel') and should avoid making a decision that would have far-reaching implications for providers of online video."); Comments of M3X at 9 ("Without prejudice to the Sky Angel proceeding, the Bureau could also recommend to the Commission that it institute rulemaking proceedings to develop online MVPD requirements.").

[37] Comments of DIRECTV at 13.

This set of statutory qualifications therefore will "ensure that the class of entities that qualify as MVPDs will remain appropriately limited."[38] In other words, the "action would not redefine all online video platforms as MVPDs… Rather, only those MVPDs that closely emulate traditional, channel-based MVPDs will be affected."[39] Accordingly, by properly interpreting the MVPD definition, the Commission would "both promote new entry and competition without extending regulations to any services that do not wish to operate as MVPDs,"[40] exactly as Congress intended and the public interest demands.

III. AN MVPD NEED NOT BE FACILITIES-BASED OR PROVIDE ALL NECESSARY TRANSMISSION PATHS

As Sky Angel and other commenters noted, the Commission already has expressly held that the MVPD definition does not require that an entity be "facilities-based" or directly provide all necessary transmission paths.[41] Specifically, in first implementing the 1992 Cable Act, the Commission agreed with commenters "that, by including television receive-only satellite programming distributors in the definition of a multichannel video programming distributor, Congress showed that a distributor need not be facilities-based in order to come within the scope

[38] *Id.*; *see id.* at 13-14 ("As a result, third parties against which MVPDs have certain rights (such as cable-affiliated programmers and broadcasters) will not be inundated with new demands. Moreover, because these new MVPDs would provide the same sort of linear programming provided by traditional MVPDs, these third parties would not be required to offer their programming in different packages or as disaggregated parts.").

[39] Comments of Public Knowledge at 1; *see id.* at 21 ("[B]y clarifying that a 'channel' can be provided online, the Bureau would not somehow transform current services like Hulu, Netflix, and iTunes into MVPDs. While they provide 'video programming' within the meaning of the law, these services do not offer channels of programming – their content is typically available on demand.").

[40] *Id.* at 22. As it did in its initial comments, Sky Angel declines to express an opinion as to whether the Commission should ultimately rely on its ancillary authority to interpret "channels of video programming" more broadly than the term was used by Congress in 1992. This issue goes well beyond the scope of Sky Angel's service, and therefore need not be addressed in Sky Angel's program access dispute proceeding or in response to the Public Notice. *See* Comments of Affiliates Associations at 4, n. 8 ("[T]he Media Bureau need not decide in this proceeding (and perhaps should not decide absent full notice-and-comment rulemaking) whether or in what circumstances the definition of MVPD should encompass Internet-based distributors of *non-linear* programming…").

[41] *See* Comments of Sky Angel at 16-19; Comments of Public Knowledge at 9-11; Comments of Saga at 2-3; Comments of Syncbak at 1-3; Comments of Affiliates Associations at 11-13; Comments of DIRECTV at 8-10. As discussed above, various cable operators have also noted this fact to the Commission when it served their financial interests to do so.

of the effective competition test."[42] It therefore held "that a qualifying distributor need not own its own basic transmission and distribution facilities."[43] As a result, the Commission subsequently rejected an argument "that Complainants' program access protection is somehow dependent upon their ownership of transmission facilities."[44] DIRECTV recognized that the effect of these Commission holdings is that, "[a]s a matter of law, [any] conclusion that a transmission path is a necessary element for an MVPD service is simply untenable… Since [] Congress specifically provided that such satellite programming distributors *are* MVPDs, it simply cannot be the case that a transmission path is a necessary element to the definition."[45]

Similarly, when the Commission implemented the open video system ("OVS") provisions enacted by Congress in 1996, it concluded that, in addition to OVS operators, OVS "programming providers that provide more than one channel of programming clearly fit within the definition of an MVPD and that they are therefore entitled to the benefits of the program access provisions."[46] In doing so, the Commission rejected a commenter's claim "that Congress limited the applicability of the program access rules to operators of open video systems."[47] This commenter then sought reconsideration of the Commission's order, arguing that Congress' failure to add OVS programming providers to the list of representative entities in the MVPD definition was "significant, in that the listed MVPDs all operate the vehicle for distribution."[48]

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[42] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5651-52 (1993) ("*1993 Cable Rate Order*") (emphasis added).

[43] *Id.* at 5652.

[44] *Turner Vision, Inc. et al. v. Cable News Network, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 12610, 12635 (CSB 1998).

[45] Comments of DIRECTV at 9 (emphasis in original).

[46] *Implementation of Section 302 of the Telecommunications Act of 1996*, Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, 20297 (1996) ("*Section 302 Recon Order*") (emphasis added).

[47] *Implementation of Section 302 of the Telecommunications Act of 1996*, Second Report and Order, 11 FCC Rcd 18223, 18324 (1996).

[48] *Section 302 Recon Order*, 11 FCC Rcd at 20298.

But the Commission denied the petition for reconsideration, finding the "argument that video programming providers cannot qualify as MVPDs because they may not operate the vehicle for distribution to be unsupported by the plain language of Section 602(13), which imposes no such requirement."[49]

Congress' inclusion of a non-facilities-based distributor in the MVPD definition, as well as the Commission's subsequent precedent, indisputably refutes several commenters' claims, which lack any supporting citations, that an entity must be facilities-based to qualify as an MVPD.[50] Further, even where these commenters cited Commission precedent, they misinterpreted such precedent or used portions of it out of context. For instance, both Comcast and ACA equate the Commission's finding that, in certain situations, a leased access provider does not provide effective competition to a cable operator with a finding that these providers do not qualify as MVPDs.[51] In reality, the Commission expressly concluded that these providers do qualify as MVPDs. Specifically, as noted above, the Commission agreed with commenters "that a qualifying distributor need not own its own basic transmission and distribution facilities."[52] However, with respect to the effective competition test only, the Commission further concluded

[49] *Id.* at 20301. Cablevision attempts to muddy this clear holding by quoting the Commission's definition of an OVS operator, which requires ownership, control, or responsibility for the management and operation of the system. *See* Comments of Cablevision at 9, n. 21. This definition of an OVS operator, however, in no way alters the Commission's conclusion that an OVS programming provider also qualifies as an MVPD despite the fact it does not operate the vehicle for distribution.

[50] *See* Comments of Discovery at 5 ("Each of the MVPDs listed in the MVPD definition – all of which are facilities-based distributors…"); Comments of National Cable & Telecommunications Association ("NCTA") at 3 ("[A]ll of the examples in the definition … are facilities-based entities…"); Comments of Cablevision at 6 ("[E]ach of the other MVPDs identified in the statutory definition of MVPD … provides facilities-based transmission pathways…"); Comments of Comcast at 3 ("As reflected in the text, structure, history, and purpose of the relevant provisions, Congress left no doubt that MVPDs are *facilities-based* providers…") (emphasis in original); Comments of American Cable Association ("ACA") at 9 ("The Commission has accordingly, when confronted with the question who is an MVPD for statutory purposes, employed a facilities-based understanding of the term.").

[51] *See* Comments of Comcast at 7; Comments of ACA at 9. Comcast also argues that other provisions of the 1992 Cable Act demonstrate that Congress intended only to encourage facilities-based competition. *See* Comments of Comcast at 5-6. But all of these provisions – a prohibition of exclusive franchises, a revision of the cable inside wiring rules, and allowing municipalities to build networks – are wholly unrelated to MVPDs generally or the program access rules, and therefore have no bearing on the proper interpretation of the MVPD definition.

[52] *1993 Cable Rate Order*, 8 FCC Rcd at 5652.

that "the facilities a multichannel distributor uses cannot be those of the [cable] operator."[53] Obviously, if a consumer can only access another programming distribution service through an existing cable system, that alternate service cannot provide adequate, or "effective," competition to the cable system. The Commission's treatment of video dialtone systems in the same order clearly supports this interpretation of its holding with respect to leased access providers. Specifically, although the Commission concluded that a video dialtone system generally "can provide effective competition to a cable operator," it found that "a joint venture between a telephone company and a cable system located in the same franchise area to offer video dialtone service cannot be considered effective competition to that incumbent cable system."[54] Thus, these commenters confuse different standards in an attempt to cobble together a legal argument.

In addition, NCTA cites to the Commission's decision in *Wizard Programming* as support for its claim that a "packager" of video programming that does not provide a transport component fails to qualify as an MVPD.[55] But NCTA has confused the facts and Commission holdings in that dispute. In reality, the defendant, SNG, was the entity that "assemble[d] the various programming packages,"[56] and the fact that SNG was an MVPD was uncontested.[57] In contrast, Wizard, who the Commission concluded did not qualify as an MVPD, was a "mass-marketer."[58] Moreover, neither entity's ownership or control of transmission paths, or the lack thereof, factored into the Commission's decision. Rather, because "[t]he program access rules are premised on the assumption that a complainant MVPD has purchased or seeks to purchase

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[53] *Id.*

[54] *Id.* at 5650.

[55] *See* Comments of NCTA at 4-5 (citing *Wizard Programming, Inc. v. Superstar/Netlink, L.L.C. and Tele-Communications, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 22102, ¶ 17 (CSB 1997)).

[56] *Wizard*, 12 FCC Rcd at 22111.

[57] *Id.* at 22106-08.

[58] *Id.* at 22111.

programming from the defendant,"[59] Wizard failed to qualify as an MVPD because it did "not purchase programming from SNG, and it [did] not sell programming to consumers."[60] In addition, Wizard was "not 'making [programming] available' to subscribers," as required by the MVPD definition, because SNG acquired and packaged the programming, and SNG handled all customer interactions, including billing.[61] This decision therefore in no way supports NCTA's claims, while other Commission precedent directly refutes those claims. For instance, when the Commission first adopted its program access rules, it noted that the term HSD distributors – a term traditionally used to refer to "television receive-only satellite program distributors"[62] – includes "many different types of entities … including entities that are commonly known as HSD dealers or *third-party program packagers*."[63]

Moreover, the "single reference to 'facilities-based' competition in the House Conference Report cannot be read as a limitation upon the otherwise broad statutory definition of MVPD, which includes no reference to the provision of a transmission 'facility' or 'path.'"[64] In fact, reliance on this lone Congressional mention of facilities-based competition would directly conflict with the statutory language, which includes a non-facilities-based distributor in the MVPD definition.[65] Clearly, then, this single reference does not "emphasize[] Congress' single-

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[59] *Id.* at 22110.

[60] *Id.* at 22111.

[61] *See id.*

[62] *See* Comments of DIRECTV at 8.

[63] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, First Report and Order, 8 FCC Rcd 3359, 3366, n. 7 (1993) (emphasis added).

[64] Comments of Affiliates Associations at 12-13; *see* Comments of Public Knowledge at 15 ("If it intended to require that MVPDs be facilities-based it could have easily said so in the statute."); *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994) ("[I]t is the statute, and not the Committee Report, which is the authoritative expression of the law, and the statute prominently *omits* reference to generation.") (emphasis in original).

[65] *See Abell v. Spencer*, 225 F.2d 568, 570-71 (D.C. Cir. 1955) ("[O]ne sentence in a Senate report is not controlling where both houses of Congress have passed a bill containing unambiguous language to the contrary."); *U.S. v. Gonzales*, 520 U.S. 1, 7-8 (1997) ("The statutes clash only if we engraft onto §924(c) a requirement found only in a

minded focus on *facilities-based* alternatives" as Comcast would have the Commission believe.[66] Rather, Section 628(a), which expressly sets forth the purposes of the program access rules, makes no mention of promoting facilities-based competition.[67]

"For these reasons, it is not necessary for the Media Bureau to determine whether the Internet itself constitutes a 'transmission path' since a transmission path is not essential to an entity's status as an MVPD."[68] Such a determination also would be irrelevant because the program access laws are consumer-focused, and "[c]ontrol over the transmission path is completely immaterial to the consumer. The consumer is interested in the content of the programming, not the means of delivery."[69] Nevertheless, as Sky Angel previously detailed, it owns or controls significant and essential transmission paths, including satellite uplinks and downlinks, fiber connections, and the final transmission path passing through its subscribers set-top boxes.[70] It also has the legal right to distribute the programming based upon its contractual

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single sentence buried in the legislative history… We therefore follow the text, rather than the legislative history."); *U.S. v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 83 (1932) ("In proper cases, such reports are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms."); Comments of ACA at 20 ("Little interpretative weight should be accorded this single sentence in the Senate Report…").

[66] Comments of Comcast at 6.

[67] *See* 47 U.S.C. §548(a); *Intl. Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697, 699-700 (D.C. Cir. 1987) ("[C]ourts have no authority to *enforce* alleged principles gleaned *solely* from legislative history that has no statutory reference point.") (emphasis in original); *id.* at 712 ("[W]e emphasize that the Committee Reports' admonition against undue proliferation is *not* part of the Act. While a committee report may ordinarily be used to interpret unclear language contained in a statute, a committee report cannot serve as an *independent statutory source having the force of law*.") (emphasis in original); *Abourezk v. Reagan*, 785 F.2d 1043, 1054, n. 11 (D.C. Cir. 1986) ("[W]e think it plainly wrong … to regard committee reports as drafted more meticulously and as reflecting the congressional will more accurately than the statutory text itself. Committee reports, we remind, do not embody the law. Congress … votes on the statutory words, not on different expressions packaged in committee reports.").

[68] Comments of Affiliates Associations at 12.

[69] Comments of Saga at 3; *see* Comments of Public Knowledge at 10-11 ("Questions about the nature of the facilities an MVPD uses are thus inapposite. Consumers do not purchase 'a portion of the electromagnetic spectrum' when they subscribe to an MVPD. They buy access to content – in particular, to channels like NBC, ESPN, and Comedy Central.").

[70] *See* Comments of Sky Angel at 18-19; Comments of Public Knowledge at 10 ("[E]ven a traditional cable system does not necessarily provide a complete transmission path to a viewer's television: the viewer herself or a landlord might provide inside wiring, for instance.").

arrangements with its subscribers and with programmers. As such, Sky Angel is "facilities-based" as Discovery used that term in its comments. Specifically, Discovery noted that the Commission has found that the term "facilities-based," which is simply "a term of art in the telecommunications industry," "is commonly understood … to mean a carrier with some form of possessory interest in at least some of the equipment (such as a switch) used to complete calls."[71]

Commenters also noted that even Internet-based distributors lacking Sky Angel's extensive distribution system do, in fact, also provide transmission paths.[72] For instance, Syncbak described its system, which is similar to Sky Angel in several ways, to demonstrate how the transmission path between the video service provider and the consumer "is composed of a variety of interconnected physical links and multiple layers of logical links that provide the equivalent of signaling, addressing, transport and other functions."[73]

> Synbak's system, for example, relies on Internet links for its transmission path, but Syncbak itself has designed a built technical platform that relies on proprietary hardware, software to create and manage the end-to-end transmission path of each video service it distributes, from the Syncbak server to the end user. Syncbak does not simply route video into the cloud to any user at any time on any device. Syncbak (or its local partner) encodes and encrypts the programming, authenticates the user's right to the programming, initiates the stream, and provides a connection from the video source to a content distribution network ('CDN'), which in turn (and at Syncbak's behest) obtains access to additional physical links required to complete the transmission path.[74]

In other words, the "different elements of those transmission paths are owned, controlled and operated by a variety of entities, each providing a discrete service or functionality (or suite

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[71] Comments of Discovery at 6, n. 19 (quoting *APPC Services, Inc., Data Net Services, et al. v. Network IP, LLC, et al.*, Memorandum Opinion and Order, 20 FCC Rcd 2073, ¶ 15 (2005)) (emphasis added).

[72] *See* Comments of Syncbak at 7 ("[T]he Bureau's apparent belief that the transmission path for any consumer Internet video service is provided by the consumer's Internet service provider is technically and logically wrong."); Comments of Public Knowledge at 10 ("[E]ven if the Bureau decides that wireless systems do 'provide' (or 'make available') a transmission path, it is not clear that online systems do not provide transmission paths in the same way. … Given this background, since online services generally own or lease some facilities (such as servers) and 'transmit' programming partly on their own Internet connections, they 'provide' transmission paths in the same sense as other MVPDs.").

[73] Comments of Syncbak at 7-8.

[74] *Id.* at 8.

of services and functionalities)."[75] Accordingly, although "the consumer's ISP may play a role," it certainly does not "'provide the transmission path.' At best, it provides a portion of the transmission path. And it does not even do that on its own behalf – it does so in fulfillment of contractual relationships under which it is paid and obligated to provide that service to the consumer, on one end, and Syncbak's CDN, on the other."[76] Moreover, "in many if not most cases, the consumer's ISP does not even provide the terminating link in the path. The final link for in-home viewing is commonly provided via Ethernet or WiFi, beyond the ISP's network demarcation point."[77] Sky Angel even controls a transmission path beyond that point because its encrypted programming cannot be viewed without the proprietary set-top box, which Sky Angel directly and remotely controls at all times.[78]

Commenters also agree with Sky Angel that no basis exists to find that a video programming distributor using in part broadband Internet connections must have any type of common ownership, affiliation, or other business arrangement with Internet service providers in order to "make available" multiple channels of video programming.[79] For instance, the Affiliates Associations noted that "[s]uch a regulatory definition would be unpredictable, unnecessarily complicated, and, ultimately 'unworkable,'" as demonstrated by the questions and hypotheticals

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[75] *Id.*

[76] *Id.*; *see id.* ("The consumer's ISP is simply a passive carrier for a portion of the link, no more or less important to the transmission path than the link from the Syncbak server to the CDN or the protocols and authentication methods Syncbak uses."). *See also* Comments of M3X at 5, n. 12 ("Consumers have by all intents extended their 'pull' to the online MVPD's portal, whereupon recognition of the consumer's device, the MVPD establishes the IPTV communications path in the mixed use packet switched network context. M3X asserts the applicability of the Carterphone principle to the customer's ISP as well; otherwise how else would the end-user consumer device become connected to access the path.").

[77] Comments of Syncbak at 8; *see id.* at 9 ("Obviously, when Syncbak service is used by consumers a transmission path exists. That path is made through a variety of interconnected physical and logical links. But it is *defined* and *created*, and therefore it is *provided*, by Syncbak. Certainly, if the question is whether the consumer's ISP or Syncbak is the provider, the answer is easy: Syncbak is the provider.") (emphasis in original).

[78] *See* Comments of Sky Angel at 19.

[79] *See id.* at 34-35.

outlined in the Public Notice.[80] And M3X Media explained that requiring even a minimal affiliation would deter increased competition from Internet-based MVPDs because a "consumer would be required to obtain an additional Internet access account, or, more likely, he or she would be consigned to use a bundled Internet/MVPD service with extra cost and co-opted consumer choice as to an individual's desired Internet access."[81] As Sky Angel noted in its comments, this would, in turn, favor incumbent cable operators, who a majority of Americans rely on for broadband Internet access.[82]

In addition to being contrary to statutory law and precedent, applying a facilities-based requirement to the MVPD definition would fail as a practical matter. Many current MVPDs deliver programming to subscribers without owning all of the distribution facilities. No wireless distribution system, including satellite, can be entirely facilities-based because a private entity is prohibited by statute from ownership of radio spectrum.[83] Wireless carriers distribute programming via a legal right – an FCC license – but not through ownership.[84] Cable over-builders also reach subscribers via legal rights but not through ownership. However, as noted above, for many years the Commission has classified satellite, other wireless carriers such as MMDS, and cable over-builders as MVPDs. Would the Commission remove the MVPD classification from these classes of distributors as an outcome of its ruminations in the instant proceeding? Moreover, many large, incumbent MVPDs have, or actively are pursuing, forms of "TV Everywhere" by which their subscribers may view live programming channels via Internet

[80] Comments of Affiliates Associations at 18.

[81] *Id.*

[82] *See* Comments of Sky Angel at 35.

[83] *See* 47 U.S.C. §301.

[84] *See* Comments of Public Knowledge at 10 ("[W]ireless systems like DBS and MMDS do not similarly 'provide' transmission paths. They use licensed spectrum to transmit information like any other wireless services. They did not build this spectrum and do not 'provide' it.").

access from any domestic U.S. location, whether within their own systems or outside of them.[85] Does DISH cease being an MVPD because it makes available to its 14 million subscribers Internet access to all of the live channels to which they subscribe at home (including Discovery channels)? Do Comcast, Cablevision, and TWC cease being MVPDs when their subscribers travel outside of their franchised service areas but receive the channels they subscribe to via an Internet connection and a "TV Everywhere" offering? Therefore, in addition to the obvious conclusions based on law and precedent, the Commission cannot graft a facilities-ownership condition onto the MVPD definition without causing irrational havoc to its current regulatory scheme.

IV. THE COPYRIGHT OFFICE DECISION THAT INTERNET-BASED DISTRIBUTORS DO NOT QUALIFY FOR THE CABLE COMPULSORY LICENSE IS IRRELEVANT HERE

Despite the claims of Cablevision and MPAA,[86] it is irrelevant that the Copyright Office has found that Internet-based video distributors do not satisfy the definition of a cable system in the Copyright Act and therefore do not qualify for the cable compulsory license found in Section 111 of the Copyright Act.[87] As the Affiliates Associations recognized, "[i]t is self-evident that the term MVPD under the Communications Act is much broader than the meaning of 'cable system' under Section 111 of the Copyright Act since the term MVPD encompasses satellite

[85] *See* Comments of Syncbak at 10 ("MVPDs increasingly are making their content available in ways that unquestionably go beyond the limits of their own physical plant, including various TV Everywhere initiatives and place-shifting technologies incorporated in MVPD-supplied hardware. The transmission paths for these services often extend beyond the MVPD's physical plant, and in other cases (such as TV Everywhere) the MVPD's physical plant may not be used at all.").

[86] *See* Comments of Cablevision at 15-16; Comments of MPAA at 3-6.

[87] *See* Comments of Adelphia Communications Corp., *et al.*, MM Docket No. 92-259, p. 26 (Jan. 4, 1993) ("The Commission does not have the discretion to apply the retransmission consent provisions of the statute any differently depending on whether the entity involved is covered by the compulsory copyright licensing provisions of the Copyright Act."); Comments of Time Warner Entertainment Company, L.P., MM Docket No. 92-259, p. 35 (Jan. 4, 1993) ("The Commission does not have the discretion to apply the retransmission consent provisions of the statute any differently depending on whether the entity involved is covered by the compulsory copyright licensing provisions of the Copyright Act.").

carriers which do not qualify for the Section 111 statutory license but instead required enactment of separate statutory licenses in Sections 119 and 122 of the Act."[88]

In fact, prior to the enactment of the Section 122 statutory license in 1999, which created a compulsory license for the retransmission of local television signals by satellite carriers, the Copyright Office concluded that satellite carriers failed to qualify for the Section 111 cable compulsory license, and therefore could not carry local broadcast signals.[89] Similar to its decision that Internet-based distributors do not qualify for the cable compulsory license, the Office found that "Congress intended the compulsory license to apply to localized retransmission services, and not nationwide retransmission services such as satellite carriers."[90] In the same decision, the Copyright Office also "conclude[d] that MDS and MMDS operations do not satisfy the definition of a cable system appearing in section 111, and therefore do not qualify for cable compulsory licensing."[91] The Copyright Office came to these conclusions despite the fact that both satellite carriers and MMDS operators are among the specifically enumerated examples of MVPDs in the statutory definition. In doing so, the Office noted that "it is not bound by FCC precedent, nor the definition of a cable system appearing in the Cable Act, in interpreting the definition of a cable system for section 111 purposes."[92]

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[88] Comments of Affiliates Associations at 10, n. 18.

[89] *See* Copyright Office, *Cable Compulsory License; Definition of Cable Systems*, Final Regulation, 57 Fed. Reg. 3284, 3292 (1992) ("*1992 Copyright Decision*") ("Satellite carriers are not cable systems under section 111 because they simply do not satisfy the definitional requirements, and do not fit within the constraints Congress has placed on the cable compulsory license.").

[90] *Id.*; *see id*. at 3290 ("[S]ection 111 is clearly directed at localized transmission services."); *see* Copyright Office, *Cable Compulsory Licenses; Definition of Cable Systems*, Final Rule, 62 Fed. Reg. 18705, 18707 (1997) ("*1997 Copyright Decision*") ("[T]he Office retains the position that a provider of broadcast signals be an inherently localized transmission media of limited availability to qualify as a cable system.").

[91] *1992 Copyright Decision*, 57 Fed. Reg. at 3296. These entities eventually qualified for the §111 compulsory license, but only because "Congress passed the Satellite Home Viewer Act of 1994, Public Law 103-369, which amended the definition of a 'cable system' in section 111 to include 'wireless' cable systems, such as the multichannel multipoint distribution systems." *1997 Copyright Decision*, 62 Fed. Reg. at 18706, n. 1.

[92] Copyright Office, *Cable Compulsory License; Definition of Cable Systems*, Notice of Proposed Rulemaking, 56 Fed. Reg. 31580, 31593 (1991).

Likewise, the Commission is not bound by any Copyright Office decisions, particularly when those decisions concern a statutory license which is restricted to cable systems, and which has an entirely different purpose and scope than the MVPD definition and the program access rules. For instance, in direct contrast to the broad MVPD definition, "[n]othing in the legislative history suggests that Congress intended an open-ended definition of the entities qualifying for the license. To the contrary, the compulsory license is hedged and qualified by strict limitations."[93] As a result, "the Office has always maintained that compulsory licenses are to be construed narrowly."[94] In addition, unlike Congress' treatment of MVPDs, the cable compulsory license was intended to be technology-specific.[95] Further, because "[t]he reasons offered for enactment of the cable and satellite licenses, and compulsory licenses in general, are essentially economic ones,"[96] the "Copyright Office is not imbued with authority to expand the compulsory license according to public policy objectives."[97] In contrast, the program access rules were specifically enacted to advance the public interest.

Moreover, the Copyright Office's recommendation that Congress not enact a new statutory license for Internet-based video distributors related only to web-based services, not an entity such as Sky Angel that simply relies on its subscribers' broadband Internet connections as one portion of its distribution system. For instance, the Office noted that "[t]here are currently

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[93] *Id.* at 31592.

[94] *1992 Copyright Decision*, 57 Fed. Reg. at 3291. In fact, the Copyright Office has repeatedly recommended the elimination of compulsory licenses, so it is not surprising that it would not recommend the expansion of the current licenses or the creation of a new license for Internet-based video distributors. *See* Copyright Office, *Satellite Home Viewer Extension and Reauthorization Act, Section 109 Report*, p. 85 (June 2008) ("*SHVERA Report*") ("[O]ur principal recommendation is that Congress should abandon Sections 111 and 119 of the Act. The Office finds that the need for these statutory licenses has dissipated over time."); *id.* at 82 ("It is clear to us that Section 111 is an anachronistic licensing scheme that cannot readily accommodate new types of services, such as IP, or changes in technology, such as digital television.").

[95] *See 1992 Copyright Decision*, 57 Fed. Reg. at 3295-96 ("It is [] counter-intuitive to assert that Congress intended a technology neutral compulsory license in 1976 applicable to all types and forms of video delivery systems…").

[96] *Statement of the Register of Copyrights Before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary*, 2000 WL 807143, at *2 (June 15, 2000) ("*Statement of the Register of Copyrights*").

[97] *1992 Copyright Decision*, 57 Fed. Reg. at 3292.

three different technological paradigms for openly distributing video programming, including broadcast content, over the Internet. One method is to stream video content that may be accessed by anyone with an Internet connection… The second method to deliver video content to end users is through server downloads. This type of delivery is epitomized by Apple's iTunes. The last method is peer-to-peer delivery."[98] Clearly, Sky Angel does not provide any of these distribution methods.

Accordingly, the reasoning behind the Copyright Office's recommendation to Congress does not apply to Sky Angel. For instance, the Office noted that web-based services have the "ability to disseminate programming 'instantaneously worldwide' without any territorial restrictions…"[99] Therefore, its "principal concern is the extent to which Internet retransmissions of broadcast signals can be controlled geographically."[100] In contrast, like a satellite carrier, Sky Angel has the ability to, and does, restrict its service to the United States.[101] The Office also noted that, with respect to web-based distribution services, "even if protection devices are in place to limit receipt of a broadcast signal from a source to a specific geographic location, there may be no control over the receiver of that signal that prevents him from further retransmitting the signal to others."[102] In contrast, Sky Angel's set-top box employs industry-standard copy protection that prevents the copying or further retransmission of the programming it

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[98] *SHVERA Report* at 181-82; *see id.* at 185 ("The Office continues to oppose an Internet statutory license that would permit any website on the Internet to retransmit television programming without the consent of the copyright owner.") (emphasis added); Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals*, p. 93 (Aug. 1, 1997) ("*1997 Copyright Report*") (noting that AudioNet, which was "the primary proponent of the eligibility of computer networks for the cable compulsory license," "broadcasts audio and some video events in real time via the Internet to anyone anywhere in the world who has a computer with audio capability and access to the World Wide Web.").

[99] *Statement of the Register of Copyrights*, 2000 WL 807143, at *4.

[100] *Id.* at *9.

[101] *See 1997 Copyright Report* at 97 ("[S]atellite technology … allows for the restriction of retransmissions within the United States").

[102] *Statement of the Register of Copyrights*, 2000 WL 807143, at *9.

distributes.[103] As the Copyright Office acknowledged, the availability of this type of technology weighs in favor of a compulsory license.[104]

The Copyright Office also recommended against a compulsory license for web-based distributors due to international considerations, but Sky Angel's service complies with the restrictions imposed by the Berne Convention for the Protection of Literary and Artistic Works ("Berne"). For instance, "Berne requires member countries to impose territorial limitations on retransmission that are carried out under a compulsory license,"[105] something that Sky Angel already does.[106] In fact, Sky Angel's service allows for greater territorial limitation than that of a satellite carrier, whose "'footprint' on the ground where the satellite signal can be received often crosses national boundaries."[107] Nevertheless, the Copyright Office found that satellite does not pose a problem with respect to Berne because, like Sky Angel, its "signals are encrypted and require a special decoder for viewing," which allows "territorial limitations [to] be enforced by controlling the availability of the decoders."[108] Regardless, this proceeding is wholly unrelated to compulsory copyright licenses, as Sky Angel has not sought to benefit from those statutory grants of authority. Rather, Sky Angel enters into written programming agreements with each of its content partners under which Sky Angel pays per-subscriber carriage fees.[109]

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[103] *See* Comments of Sky Angel at 3.

[104] *See Statement of the Register of Copyrights*, 2000 WL 807143, at *9 ("[T]echnological solutions may be developed to address these concerns, but until they are, and unless we can be confident of their reliability and security, enactment of a compulsory license for local signals would place broadcast programming in jeopardy.").

[105] *Id.* at *11; *see id.* ("In order to comply with Berne's territorial limitation on compulsory licenses, a compulsory license for retransmission of broadcast television signals on the Internet could only permit such transmissions for reception within the United States.").

[106] *See id.* at *12 ("[W]hether a Berne-compatible compulsory licensing regime is possible … depends largely on the business model adopted by an entity that wishes to retransmit television signals on the Internet.").

[107] *Id.*

[108] *Id.*

[109] And, if Sky Angel were to distribute the signal of a television station, or network, it would do so only after entering into a distribution agreement with that station or network.

V. CONGRESS USED THE PHRASE "MULTIPLE CHANNELS OF VIDEO PROGRAMMING" TO MEAN "MULTIPLE NETWORKS OF VIDEO PROGRAMMING"

With respect to video programming, the term "channels" is almost invariably used to mean "programming networks."[110] And, as the detailed legislative history provided by Sky Angel demonstrates,[111] Congress used "channels," as found in the MVPD definition, in this way.[112] Sky Angel also provided numerous examples where the Commission similarly used "channels" to mean "programming networks."[113] Moreover, this interpretation of "channels" would advance Congress' goals in enacting Section 628, as the clear intent of the program access regime is to increase competition, encourage new communications technologies, and protect a

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[110] *See*, *e.g.*, Comments of DIRECTV at 11 (noting that such an interpretation would "accord with common usage."); Comments of Discovery Communications, Inc., MM Docket No. 92-265, p. 1 (Jan. 25, 1993) ("Discovery … owns and operates The Discovery Channel and The Learning Channel. Both channels provide programming to cable operators and other multichannel video distributors on a nondiscriminatory basis.") (emphasis added); *Cablevision Systems Development Co. v. MPAA*, 836 F.2d 599, 602, n. 3 (D.C. Cir. 1988) ("The words 'station' and 'channel' are synonymous for purposes of this opinion and refer to an entity that transmits by broadcast or cable a single regular schedule of programming. For example, a local affiliate of a network is a station or channel, as is a cable-originated entity such as ESPN…"); *SHVERA Report* at 35 ("AT&T is considered to offer a 'pure' IP service because all programming, including live television channels, are delivered on demand to U-Verse video customers. In fact, one of the biggest differences between traditional cable architecture and AT&T's model is how channels are tuned for the viewer. Cable operators deliver all programming from local headend servers to all subscribers, who are able to view channels based on their subscription package. With IP, AT&T delivers a video signal for an individual video programming service only after a subscriber selects it with a remote control. But to the subscriber, it would appear similar to traditional broadcast television, since the channel is delivered in less than 300 milliseconds.").

[111] *See* Comments of Sky Angel at 25-28; *see also* Comments of DIRECTV at 11 ("Congress contemporaneously understood and used the term in the same manner."); Comments of Affiliates Associations at iv ("Congress clearly used the term 'channel' in Section 602(13) in an everyday, non-technical sense to mean a stream or network of video programming."); Comments of Public Knowledge at 22 ("[I]n the context of the 1992 Cable Act 'channel' unambiguously refers to a stream of prescheduled video programming…").

[112] Notably, commenters making contrary arguments failed to provide any support for their assertions. *See*, *e.g.*, Comments of Discovery at 5 (failing to cite to any precedent in claiming that "nothing in the Communications Act or its history supports an argument that 'channel' was meant to have some alternate meaning"); *id.* at 6 (failing to cite to any precedent in claiming that "[u]se of the term 'channel' in the legislative history of the 1992 Act and in the FCC's own regulations confirm that Congress and the Commission both understand 'channel' in the MVPD context to mean the signaling path over which video programming is distributed."); Comments of TWC at 4 (failing to cite to any precedent in claiming that "[n]othing in the text or legislative history of the Act supports redefining the term 'channels' to mean 'video programming networks.'").

[113] *See* Comments of Sky Angel at 28-32; *see also* Comments of DIRECTV at 11 (noting that, in imposing public interest carriage obligations on DBS operators, the Commission adopted a "set-aside obligation [] measured by the number of 'channels' of video programming networks … rather than the number of satellite transponders.") (citing *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. 1589, ¶ 13 (1993)).

consumer's ability to access one or more programming networks – *i.e.*, The Discovery Channel or other programming 'channels' – from its preferred distributor at affordable rates.[114]

Sky Angel also detailed why it is not only reasonable, but mandatory, for the Commission to interpret the MVPD definition without reference to the earlier-adopted, and entirely separate, definition of "channel," which is expressly synonymous with "cable channel."[115] Various commenters agree with all of the supportive points made by Sky Angel in this respect. For instance, AT&T notes that this definition is "expressly limited only to a cable system,"[116] and therefore "applies solely to a cable system, not to any other type of MVPD."[117] The fact that Congress included "channel" as a short-hand reference to "cable channel" does not alter this analysis because the ease of use it created in drafting the 1984 Cable Act "made sense at the time insofar as the only MVPDs were cable systems."[118] Any argument to the contrary – *i.e.*, that Congress intended the definition to apply to the use of the term "channel" in every section of the Cable Act, including those adopted eight years later – "founders on the fact that section 602(4) is limited expressly and only to channels 'used in a cable system.'"[119]

Various commenters also agree that Congress, by not altering the definition of "cable channel" when it adopted the MVPD definition years later, did not intend for "MVPD" to be

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[114] *See* Comments of Sky Angel at 24-25; Comments of Public Knowledge at 4 ("[T]he word 'channel' in the 1992 Cable Act should be given a 'content' reading, since only that reading is consistent with the Act's pro-competitive purposes").

[115] *See* Comments of Sky Angel at 21-24.

[116] Comments of AT&T at 4.

[117] *Id.* at 3; *see* Comments of Affiliates Associations at iv ("The broad statutory definition [] cannot be limited by the technology-specific definitions of the terms 'channel' and 'cable channel' that appear elsewhere in the statute.").

[118] Comments of AT&T at 5; *see Amer. Scholastic TV Programming Found. v. FCC* 46 F.3d 1173, 1179 (D.C. Cir. 1995) ("The singular focus on the regulation of cable systems holds throughout the [1984 Cable] Act."); *id.* at 1180, n. 5 ("The 1992 Amendments to the Act include some references to the 'multichannel video market' generally … These amendments, of course, do not elucidate the intent of the earlier Act.").

[119] Comments of AT&T at 4.

interpreted by reference to that cable-specific definition.[120] "Under well-established canons of statutory construction, the Commission cannot adopt an interpretation of that definition that would read out of the Act the express limitation included by Congress."[121] This is because "[t]here is simply no way that the cable-centric definition of 'channel' can be squared with the list of non-cable providers listed in the definition of 'MVPD.'"[122] Accordingly, "it is not a matter of 'ignoring' the statutory definition of 'channel,' but rather of recognizing from the context that its meaning as used in the definition of 'MVPD' can be something different than its meaning in other contexts."[123] In other words, the FCC simply cannot accept this irrational narrowing of the MVPD definition unless it intends to declassify many video distributors from the current MVPD definition, including DISH and DIRECTV.

Sky Angel also noted that, because "Congress did not differentiate among the technologies used by competitors in the program access provisions,"[124] "channels" cannot be defined by any technology-specific reference. In fact, because Congress intended the 1992 Cable Act "to promote competition from alternative providers and technologies in the video space, it plainly did not intend to limit the term MVPD to those using a particular technology."[125] "Instead, it is plain that Congress in Section 602(13), as it has done elsewhere, used a term with a

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[120] *See, e.g., id.*

[121] *Id.*

[122] Comments of DIRECTV at 5; *see* Comments of Affiliates Associations at 7-8 ("If the statutory definition of 'channel' were strictly and literally incorporated into the definition of MVPD, and thus the requirement that a channel be 'used in a cable system' were construed as an absolute definitional limit, then the non-cable entities that are among the statutorily enumerated MVPDs – such as DBS and MMDS – would actually not be MVPDs themselves since none could meet the statutory definition of a 'cable system.' That result would obviously be an absurdity.").

[123] Comments of DIRECTV at 6.

[124] *Implementation of Cable Television Consumer Protection and Competition Act*, Memorandum Opinion and Order on Reconsideration of the First Report and Order, 9 FCC Rcd 1902, 1950 (1994).

[125] Comments of AT&T at 5; *see* Comments of Affiliates Associations at 7 ("[A]s a fundamental matter of both statutory construction and common sense, the Bureau *cannot* read the highly technical statutory definition of 'channel' as a limitation upon the otherwise expansive definition of MVPDs.") (emphasis in original).

potentially technical meaning in the everyday sense in which it has been used in discussions of communications policy issues."[126]

Finally, "[i]f the definition of channel were read technically to limit 'channels' to those provided by cable systems, Section 602 (and, in particular, subsections (4) and (13)) would be hopelessly irreconcilable, and only cable systems, but none of the other entities expressly enumerated as MVPDs, would be capable of providing 'channels' of programming."[127] In contrast, all of the words in the MVPD definition "have meaning if, and only if, the term 'channel' used in that section is construed in an everyday, non-technical sense" to mean programming network.[128] Discovery, Cablevision, and TWC argue the exact opposite – that interpreting "channel" to mean "programming network" would render use of the word "channels" superfluous. But this argument stretches the bounds of reason, as Cablevision demonstrated when it claimed that interpreting "channels" to mean "networks" would "effectively rewrite[] the phrase as 'video programming network of video programming.'"[129] Clearly, the proper interpretation would be "multiple networks of video programming." In fact, interpreting "channel" to mean a transmission path as these commenters argue, and thus requiring that an entity "make available multiple transmission paths of video programming," would be unworkable because it would exclude various "traditional" MVPDs, including many cable systems that rely on Switched Digital Video technology.

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[126] Comments of Affiliates Associations at 7 (internal quotation marks omitted).

[127] *Id.* at 8; *see id.* at iv ("A contrary conclusion would render Section 602(13) and 602(4) hopelessly irreconcilable and the statutory definition of MVPD largely meaningless, as the non-cable entities expressly identified as MVPDs by statute (such as DBS and MMDS) are incapable of delivering 'channels' of programming via a 'cable system.'"); Comments of AT&T at 5 ("The only reasonable reading of the reference to 'multiple channels of video programming' in the definition of MVPD is that Congress was referring to those entities distributing access to multiple programming networks – not those distributing multiple 'portion[s] of the electromagnetic frequency spectrum which [are] used in a cable system.'").

[128] Comments of Affiliates Associations at iv; *see id.* at 9.

[129] Comments of Cablevision at 13; *see* Comments of Discovery at 8; Comments of TWC at 5.

In sum, because (i) Congress consistently used the term "channels" in the common, everyday sense, (ii) Congress did not define "channels" as used in the MVPD definition, (iii) using the "cable channel" definition would exclude all MVPDs except for cable operators from the MVPD definition, (iv) equating "multiple channels" with "multiple transmission paths" would exempt many "traditional" MVPDs from the scope of the MVPD definition, and (v) interpreting "multiple channels" to mean "multiple networks" would advance the purposes of the program access rules, the only reasonable and non-arbitrary way to define an MVPD is simply to require that an entity "makes available for purchase, by subscribers or customers, multiple networks of video programming."[130]

VI. THE PUBLIC INTEREST REQUIRES THAT SKY ANGEL'S INNOVATIVE SERVICE BE CLASSIFIED AS AN MVPD ENTITLED TO THE PROTECTIONS OF THE PROGRAM ACCESS RULES

As Sky Angel detailed in its comments, permitting new types of video programming distributors to obtain the program access protections is necessary to advance the competitive benefits Congress sought to achieve in order to benefit consumers.[131] New Internet-based competitors also will encourage broadband adoption.[132] Various commenters likewise noted these and other public interest benefits that would arise from a proper interpretation of the

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[130] *See* Comments of Public Knowledge at 2 ("As used in the Cable Television Consumer Protection and Competition Act of 1992, a 'channel' is a stream or signal of prescheduled video programming. Since an online distributor like Sky Angel offers 'channels' in this sense just as DirecTV or Time Warner Cable do, such distributors meet the definition of MVPD.").

[131] Comments of Sky Angel at 36-40; *see* Comments of National Ass'n of Broadcasters ("NAB") at 2 ("Increased competition is a long-standing public policy goal, one that can be a positive for consumers, broadcasters and other program providers.").

[132] *See* Comments of Sky Angel at 40; Comments of M3X at 3 ("It is undeniable that video will be the singlemost economic driver of broadband deployment and penetration."); Copyright Office, *Satellite Television Extension and Localism Act, §302 Report*, p. 33 (Aug. 29, 2011) ("Just as cable and satellite have slowly replaced broadcast television as the dominant mass communications medium in the United States, it is possible and probably likely that the Internet will replace cable and satellite as the preferred way to consume broadcast and cable content in the majority of American households."); Comments of Verizon at 10 ("To provide consumers with the best picture quality, [over-the-top, IP-based video] services require high-speed connections. Broadband providers made – and continue to make – the investments necessary to provide consumers with those high-speed connections. As a result, over-the-top, IP-based video … 'will account for over 50 percent of consumer Internet traffic' by the end of this year.").

MVPD definition. For instance, Syncbak noted that "[m]ore competition fosters innovation, efficient use of resources, and economic growth," which "is good for consumers."[133] And WGA explained that, "[g]iven the market concentration and rising costs to consumers, it is vitally important to the competitive landscape that MVPDs include not only those entities that provide the transmission path but also those that utilize new distribution platforms, such as the Internet, to deliver video programming."[134]

In addition to lower prices and increased innovation due to enhanced competition, Public Knowledge also noted that consumers would benefit because they will be able "to choose from between a large number of competitive MVPDs instead of being limited to the same few options, year after year."[135] And WGA detailed how these additional options would benefit consumers:

> Sky Angel provides a service to a niche market of consumers seeking access to family-friendly networks and programs. Because these consumers wish for religious reasons to subscribe to some, but not all, cable channels, they are underserved by existing MVPDs that do not offer packages tailored to their needs. Moreover, because these consumers are spread across the country, it would not be economically feasible for an entity to develop its own infrastructure to serve this market segment. Without Sky Angel's ability to use the Internet as a distribution link, these consumers would remain underserved.[136]

Clearly, finding that Sky Angel qualifies as an MVPD would promote diversity in an industry currently subject to an oligopoly structure.[137]

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[133] Comments of Syncbak at 6; *see* Comments of WGA at 1 ("[A] technologically specific definition would limit the potential of the Internet to enhance competition and innovation in video programming delivery.").

[134] Comments of WGA at 3; *see id.* ("Concentration in the MVPD market helps explain why cable prices continue to rise faster than the consumer price index (CPI). The lack of effective competition allows the oligopoly firms to raise prices above that of a competitive market and maximize profit at the expense of consumers.").

[135] Comments of Public Knowledge at 17.

[136] Comments of WGA at 4; *see* Comments of NAB at 3 ("Greater platform choice, developed in a manner that respects the rights of content and signal providers, will provide benefits for consumers. For example, it is easy to see that consumers would benefit from development and deployment of new, competitive distribution platforms capable of customizing programming… Such customization may result in cost savings or increased access to programming of particular interest to the viewer.").

[137] *See* Comments of WGA at 2 ("The WGAW is extremely concerned with the lack of meaningful competition and diversity in the market for the delivery of video programming. The detrimental impact market concentration has on

Broadcasters also support an interpretation of "MVPD" that would include distributors similar to Sky Angel. NAB noted that the additional distribution opportunities provided by new MVPDs would lead to increased revenue, which could "be used to enhance news, entertainment and public service programming – furthering the objective of localism."[138] Increased revenue "could also encourage greater innovation in digital television programming, including multicast and high definition [] programming."[139] And the Affiliates Associations noted that a "contrary reading of the statute could have dire consequences for television broadcasters and the important public interest they serve, as (among other things) such programming providers would then not be obligated to obtain a television station's consent before retransmitting its broadcast signal."[140]

Sky Angel also noted in its comments that promoting the entry and viability of additional competitors benefits independent content providers.[141] NAB agreed, explaining how the "emergence of additional platforms for the distribution of video programming will provide programmers with additional outlets for reaching viewers and therefore with greater opportunities for success in the marketplace"[142] because it will increase programmers' license fees and advertising revenues.[143] Another reason why independent programmers would benefit is because, "[w]hile the program access rules prevent an MVPD from keeping a programmer

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news, information and entertainment content across distribution platforms harms both democratic discourse and the democratic process.").

[138] Comments of NAB at 3.

[139] *Id.* at 3-4; *see id.* at 3, n. 6 ("In economic terms, the emergence of new outlets and distribution platforms will allow broadcasters, by disseminating programming to a wider audience, to take advantage of economics of scale and reduce their average cost per viewer.").

[140] Comments of Affiliates Associations at v; *see id.* at 15 ("Such a result would seriously undermine the purpose of the retransmission consent regime and the weighty public interests that regime is intended to serve."); Comments of Saga at 3; Comments of NAB at 4.

[141] *See* Comments of Sky Angel at 40.

[142] Comments of NAB at 3.

[143] *See* Comments of Sky Angel at 40; Comments of Discovery Communications, Inc., MM Docket No. 92-265, p. 10 (Jan. 25, 1993) ("The amount of advertising revenue is directly related to the size of a program service's subscriber base."); *id.* at 11 ("To maximize its advertising revenues, Discovery sells to all interested customers, including alternative technology distributors.").

from being carried by other current MVPDs, nothing at the moment prevents a company like Comcast demanding, as a condition for being carried on Comcast, that the programmer stay off of online platforms."[144]

In contrast, if the Commission improperly restricts the breadth of the MVPD definition, "numerous unintended consequences will follow [that] go beyond the anti-competitive and anti-consumer effects that would be expected to follow from artificially restricting market entry."[145] For instance, while a broad interpretation of "MVPD," as Congress intended, would "ensure that the Commission's program access rules continue to promote competition as technology changes,"[146] an unnecessarily narrow, technology-specific interpretation could strip the Commission of the authority necessary to adequately regulate various "traditional" MVPDs.[147] Public Knowledge similarly recognized this potential harm:

> [I]f the Bureau continues to hold that an MVPD must provide its subscribers with a transmission path, then any programming that is delivered without a fixed transmission path may become ineligible. IP-based MVPDs such as U-Verse that may not assign particular programming networks particular frequencies may not provide any 'channels' at all if 'channel' is defined in this way. Switched digital networks on cable systems may no longer count as 'channels' since they are not continually broadcast on a fixed 'portion of the electromagnetic frequency spectrum.' And any MVPD would simply be able to spin off its facilities into a separate affiliate and then lease them back in order to avoid MVPD regulation.[148]

As a consequence, "MVPDs would have an incentive to engineer their systems inefficiently just to qualify for, or fall outside of, particular rules."[149] Such a regulatory scheme

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[144] Comments of Public Knowledge at 17-18.

[145] *Id.* at 15.

[146] Comments of WGA at 5.

[147] *See* Comments of Sky Angel at 41.

[148] Comments of Public Knowledge at 15-16; *see* Comments of Syncbak at 11 ("[A] contrary determination might permit an MVPD to escape regulation simply by separating its programming and transport services into separate business units.").

[149] Comments of Public Knowledge at 16-17; *see* Comments of Consumer Groups at 10 ("This mandate sensibly guarantees that consumers will have access to video programming even where future market developments lead MVPDs to alter the underlying technical means by which they deliver their programming.").

therefore "would invite manipulation and abuse."[150] For instance, "[w]ithout a mechanism for non cable interests to achieve online MVPD status, cable interests remain free to establish their own online video distribution systems to exclusively distribute their attributed cable programming services, accomplishing in broadband precisely what Section 628 was intended to prevent while creating a drag on the transition to national broadband."[151] Based on the initial comments, it appears some MVPDs hope for this result. For instance, Verizon urges the Commission to "confirm that a provider is not an MVPD when offering an over-the-top, IP-based video service, even if that same provider offers a separate, facilities-based video service and qualifies as an MVPD when it does so."[152] This would permit Verizon and other MVPDs to escape the various public interest regulations, including the program access rules, with respect to any IP-based services.

Another policy benefit that would arise from properly interpreting "MVPD" to include every entity that fits within the express terms of that statutory definition is that "it would ensure similar treatment of similarly situated entities."[153] In other words, "[t]o the extent an entity actually operates as an MVPD (*i.e.*, it sells multiple, full-time, linear channels of programming to subscribers), this regime establishes basic regulatory parity," which would "create a more level playing field for all those attempting to attract subscribers to linear programming services"[154] and would "further[] the goal of fostering a competitive marketplace."[155] TWC and Verizon also agree that the Commission should pursue regulatory parity, but they argue that the best method is

[150] Comments of Affiliates Associations at 18.

[151] Comments of M3X at 4; *see* Comments of Public Knowledge at 17 ("The Commission has seen ample evidence of exactly this kind of behavior – MVPDs have continually tried to skate around FCC and Congressional policy by delivering programming via terrestrial wires instead of satellite, providing only the standard definition and not the high definition versions of feeds to competitors, and so forth.").

[152] Comments of Verizon at 2.

[153] Comments of DIRECTV at 13.

[154] *Id.* at 14.

[155] Comments of NAB at 6.

to abolish regulation with respect to all MVPDs, rather than promote the public interest by applying pro-consumer, pro-competition rules to innovative new distribution services.[156]

Along these same lines, some commenters argue that properly interpreting "MVPD" to include a distributor such as Sky Angel could deter investment and dampen innovation in the marketplace because additional entities would be subject to regulation.[157] But these commenters greatly exaggerate the extent of this regulation,[158] as a review of the MVPD regulations clearly demonstrates:[159]

- Because of the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA"), all Internet-based distributors of video programming, including web-based, non-linear services, now have closed captioning obligations.[160]

- The program carriage rules would have little, if any effect, because they do not mandate carriage.

- The video description rules apply only to large MVPDs, and only with respect to the top-five non-broadcast networks. In addition, these rules only require fifty hours of described programming per calendar quarter, and these descriptions likely will be provided by programmers, not MVPDs. At the same time, these rules make programming more accessible to individuals who are blind or visually impaired.

- The retransmission consent rules do not mandate carriage, but rather simply require MVPDs to act in good faith while ensuring that broadcasters are adequately compensated for the retransmission of their signals.

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[156] *See* Comments of TWC at 2 ("[T]he best way to pursue regulatory parity is to eliminate unnecessary regulatory obligations (*i.e.*, regulate incumbents 'down' to the level of the unclassified new entrant)"); Comments of Verizon at 13, n. 19 ("To the extent the Commission is concerned about ensuring a level playing field among the providers of these various services, the proper approach is to eliminate legacy regulatory requirements on MVPDs…").

[157] *See* Comments of MPAA at 3; Comments of Open Internet Coalition at 5. In addition, Verizon implies that the Commission would also be regulating the Internet itself, *see* Comments of Verizon at 9, but, in reality, the Commission would be simply regulating the monopolistic programming practices of vertically-integrated MVPDs, irrespective of the technology used to distribute such programming.

[158] *See*, *e.g.*, Comments of Computer & Communications Industry Ass'n ("CCIA") at 1 (describing the Commission's MVPD rules as "expensive and complicated regulatory burdens").

[159] *See*, *e.g.*, Public Notice at ¶ 2; Comments of Comcast at 12-13; Comments of ACA at 3.

[160] Comcast argues that the CVAA would have been unnecessary "if Congress believed that OVDs fall within the statutory definition of MVPDs." Comments of Comcast at 7, n. 18; *see also* Comments of ACA at 21-22. But these commenters fail to recognize that the CVAA's online captioning requirements are far broader than the proper scope of the MVPD definition because the CVAA applies to services that are web-based, provide non-linear programming, and/or do not charge a fee. Clearly, then, the CVAA is not redundant.

- Although the navigation device requirement "nominally applies to all MVPDs," the Commission "has applied its rules only to cable operators."[161]

- Finally, the Commission's Equal Employment Opportunity ("EEO") rules, which inarguably serve a laudable goal, are not oppressive, and in fact are less burdensome than many states' generally applicable EEO laws.

It is difficult to understand how some commenters described these regulations, which would not impose undue burdens on emerging video distributors, as "unnecessary,"[162] "outdated,"[163] or leading to "no discernible benefit."[164]

Moreover, those commenters that exaggerated the potential harms arising from the MVPD regulations clearly were focusing on web-based, non-linear distribution of video programming. For instance, Discovery referred to "an unknown and unlimited number of online sources,"[165] Comcast claimed that "*every* party in this space" would become subject to regulation,[166] the ACA argued that "online distributors would automatically become obligated,"[167] and the MPAA speculated about what would happen if "every video player were treated as a regulated entity."[168] However, as detailed above, most Internet-based video distribution services would not be classified as MVPDs under the proposed interpretation, and certainly would not be classified as MVPDs as a consequence of a particularized finding with

[161] FCC, *Connecting America: The National Broadband Plan*, p. 50 (Mar. 2010).

[162] Comments of CCIA at 5.

[163] Comments of Verizon at 9.

[164] Comments of Comcast at 10. Indeed, it is highly unlikely that the incumbent MVPDs which make these arguments do so in a good faith effort to protect their potential competitors from regulatory burdens.

[165] Comments of Discovery at 12.

[166] Comments of Comcast at 10 (emphasis in original).

[167] Comments of ACA at 29.

[168] Comments of MPAA at 3. The MPAA also claims that interpreting the MVPD definition in accordance with its plain terms, and thereby regulating Internet-based distributors of subscription packages of linear channels, would "upset[] settled expectations that have formed the basis for marketplace negotiations." Comments of MPAA at 2. But the only precedent it provides for this assertion is the Bureau's refusal to grant Sky Angel a standstill. It is difficult to see how a recent Bureau-level decision that expressly did not reach the merits of Sky Angel's program access complaint or the nature of its service could have created any "settled expectations" in the industry.

respect to Sky Angel, which is all that is necessary to move the program access dispute proceeding forward. The Commission therefore must not allow these exaggerated potential effects of accurately interpreting the MVPD definition to affect its decision in Sky Angel's program access complaint proceeding.

VII. CONCLUSION

Based on the foregoing, the Commission cannot reasonably, or legally, determine that Sky Angel fails to qualify as an MVPD entitled to the pro-consumer, pro-competition protections of the program access rules. Far-reaching inquiries are unnecessary to Sky Angel's program access complaint against Discovery, which has been frozen under the weight of FCC regulatory inertia for approximately 27 months, when the Commission itself imposes a five-month standard for resolving program access complaints.

Based on Sky Angel's prior filings in the program access dispute proceeding, Discovery clearly has discriminated against Sky Angel in violation of the program access rules, to the detriment of Sky Angel's subscribers and potential subscribers. Action on Discovery's program access violations, along with its wanton disregard of FCC-authorized discovery obligations and its overt lack of candor, remain in limbo.[169] In all likelihood, this proceeding still would be stuck in neutral but for scrutiny by the D.C. Circuit Court of Appeals, which promptly responded to Sky Angel's Petition for Writ of Mandamus. In short, Sky Angel is wholly deserving of an immediate finding that it qualifies as an MVPD. The Commission therefore should find in favor of Sky Angel, with no further delay, and grant all relief requested in Sky Angel's program access complaint. If, however, the Commission cannot resolve the law and equities promptly, then at a

[169] At no point in Public Notice did the Bureau even mention that Sky Angel's Motion to Compel has been pending for nearly 26 months, or that its Motion for Sanctions due to Discovery's lack of candor has been pending for almost 13 months, both without any action at all.

minimum, it should grant immediately Sky Angel's *Renewed Petition for Temporary Standstill*, which has been languishing for 13 months unaddressed.

Respectfully submitted,

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